A

Hassan bin Marsom & Ors v Mohd Hady bin Ya'akop

B FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(f)-27–09 OF 2016(M)
RICHARD MALANJUM CJ (SABAH AND SARAWAK), HASAN LAH, BALIA YUSOF, AZIAH ALI AND JEFFREY TAN FCJJ
7 JUNE 2018

C

Tort — False imprisonment — Unlawful detention by police — Claimant blindfolded, stripped and assaulted by police during interrogation — Claimant detained following remand order issued by magistrate — Claim for general and special damages and exemplary and/or aggravated damages — Whether arrest D *lawful — Whether detention under remand orders valid — Whether remand order properly issued by magistrate — Whether remand order may be challenged by collateral proceeding — Protection afforded under s 31 of the Police Act 1967 — Whether damages awarded appropriate — Criminal Procedure Code ss 117 & 119*

E

The respondent accompanied his friend ('SP4') who received a telephone call asking him to come over to the Ibu Pejabat Kontinjen Melaka. SP4 was asked whether he was involved in a fight involving a police officer at a restaurant. SP4 went in to see the first appellant while the respondent waited at the guardhouse. F Half an hour later, the respondent was brought into the second appellant's room and he was blindfolded, stripped and assaulted despite his denial on his involvement in the fight. In the morning, the respondent was produced before the magistrate for a remand order under s 117 of the Criminal Procedure Code ('the CPC'). A remand order for a period of seven days, from 22–29 November G 2008, was obtained from the magistrate by the third appellant. The respondent was brought to the lock-up. Following the injuries suffered, the respondent was brought to the hospital. While still at the hospital, on 28 November 2008, the respondent's remand order was extended for another seven days until 5 December 2009. Police investigations later revealed that the respondent was H not involved in the fight and no charges were brought against him. Resulting from the assault, the respondent suffered injuries, shortness of breath and chest pains. The respondent commenced an action against the appellants at the High Court. The judicial commissioner ('the JC') awarded RM160,100 in damages. The respondent appealed to the Court of Appeal against the decision of the JC. I The Court of Appeal dismissed the respondent's appeal on the issue of quantum of damages but allowed the appeal on the declaration sought. Hence, the present appeal.

Held, dismissing the appeal:

(1) **(per Balia Yusof FCJ, majority)** The JC had not given sufficient consideration to all surrounding facts in evidence before him. In fact, from his judgment, it was quite apparent the he considered it as a non-issue. The JC found that when the third appellant applied for remand order, he was unaware as to the reason why the respondent was detained. However, the JC held that the remand order was properly and validly issued by the magistrate. Furthermore, the first remand order and its subsequent extension were obtained by the police from the magistrate(s) without the third and fourth appellants duly complying with the safeguards laid out in law for the remand orders to be issued. If the requirements of ss 117 and 119 of the CPC were not complied with, how then could the magistrate make an informed decision as to whether or not to issue the remand order (see paras 61, 67 & 73).

(2) **(per Balia Yusof FCJ, majority)** Assaults and injuries were inflicted on the respondent while he was in the custody of the police under the pretext of using the remand order. There no misuse and abuse of power and this made the detention of the respondent unlawful. The police could never be allowed to abuse the powers of detention under s 117 of the CPC. It could never be used for a collateral purpose to extort information or for any other purpose under the pretext of investigation and interrogation. The courts have a responsibility to ensure that detained suspects are not to be improperly treated (see para 103).

(3) **(per Balia Yusof FCJ, majority)** In law, the respondent has a choice of pursuing his cause either by way of the procedures provided under Chapter XXXI of the CPC or by the very action he undertook in this case. He must be allowed to have the choice of bringing an action in a civil court as an alternative to the procedures provided under Chapter XXXI of the CPC. In fact, it would be cumbersome on his part to adopt the procedures under the CPC and to subsequently file a claim in the civil court. A sheer waste of time. The High Court, being a court of unlimited jurisdiction, has an inherent power to correct any wrong that had been done in breach of any written law and to declare the legality, or otherwise, of any act purportedly done or exercised pursuant to powers conferred under the law. The respondent's liberty had been encroached. His detention was unlawful (see paras 114 & 120).

(4) **(per Jeffrey Tan FCJ, concurring)** Since the respondent was remanded under a judicial order of a magistrate, it could not be false imprisonment. The remand order might have been wrongly applied. It might even have been that there was no reasonable cause or basis for a remand order. The remand order might have been applied and/or issued without compliance with s 117 of the CPC. The remand order might even have been set aside. However, that was all inconsequential in a claim for false imprisonment.

Rather than false imprisonment, it was malicious prosecution (see paras 142 & 151–152).

[Bahasa Malaysia summary

Responden menemani rakannya ('SP4') yang menerima panggilan telefon meminta agar dia hadir ke Ibu Pejabat Kontinjen Melaka. SP4 ditanya sama ada dia terlibat dalam satu pergaduhan melibatkan seorang pegawai polis di sebuah restoran. SP4 masuk bertemu perayu pertama manakala responden menunggu di pondok keselamatan. Setengah jam kemudian, responden dibawa masuk ke dalam bilik perayu kedua dan dia dibogelkan, diserang dan matanya ditutup walaupun dia menafikan penglibatan dalam pergaduhan tersebut. Pagi yang sama, responden dihadapkan di hadapan majistret bagi perintah reman di bawah s 117 Kanun Tatacara Jenayah ('KTJ'). Perintah reman bagi tempoh tujuh hari, dari 22–29 November 2008, diperoleh oleh perayu ketiga daripada majistret. Responden dibawa ke lokap. Ekoran kecederaan yang dialaminya, responden dibawa ke hospital. Semasa di hospital, pada 28 November 2008, perintah reman responden dilanjutkan tujuh hari lagi hingga 5 Disember 2009. Siasatan polis mendedahkan responden tidak terlibat dalam pergaduhan tersebut dan tiada pertuduhan yang dihadapkan terhadapnya. Akibat serangan yang dikenakan, responden mengalami kecederaan, sesak nafas dan sakit dada. Responden memulakan tindakan terhadap perayu-perayu di Mahkamah Tinggi dan pesuruhjaya kehakiman ('PK') mengawardkan RM160,100. Responden merayu di Mahkamah Rayuan terhadap keputusan PK. Mahkamah Rayuan menolak rayuan responden terhadap isu kuantum ganti rugi dan membenarkan rayuan terhadap perisytiharan yang dipohon. Oleh itu, rayuan ini.

Diputuskan, menolak rayuan:

(1) **(oleh Balia Yusof HMP, majoriti)** Pesuruhjaya kehakiman tidak memberi pertimbangan secukupnya terhadap fakta-fakta keterangan yang dikemukakan. Malah, berdasarkan penghakiman beliau, agak jelas beliau tidak menganggapnya sebagai isu. Pesuruhjaya kehakiman memutuskan bahawa semasa perayu ketiga memohon perintah reman, dia tidak tahu sebab responden ditahan. Walau bagaimanapun, PK memutuskan perintah reman dikeluarkan oleh majistret secara sah dan teratur. Tambahan lagi, perintah reman pertama dan lanjutannya diperoleh oleh polis daripada majistret tanpa perayu ketiga dan keempat mematuhi perlindungan yang diperuntukkan bawah undang-undang untuk mengeluarkan perintah reman. Jika syarat-syarat ss 117 dan 119 KTJ tidak dipatuhi, bagaimanakah majistret boleh membuat keputusan wajar tentang sama ada atau tidak patut mengeluarkan perintah reman (lihat perenggan 61, 67 & 73).

(2) **(oleh Balia Yusof HMP, majoriti)** Serangan dan kecederaan dialami oleh responden, semasa di bawah tahanan polis, dengan helah perintah

reman. Tiada salah guna kuasa dan ini menjadikan penahanan responden tidak sah. Pihak polis tidak sekali-kali boleh dibenarkan menyalah guna kuasa tahanan bahawa s 117 KTJ. Ini tidak sekali-kali dibenarkan bagi tujuan kolateral untuk memerah maklumat atau bagi apa-apa tujuan lain dengan helah soal siasat dan siasatan. Mahkamah bertanggungjawab memastikan orang-orang yang disyaki, yang ditahan, tidak dilayan dengan salah (lihat perenggan 103).

(3) **(oleh Balia Yusof HMP, majoriti)** Di bawah undang-undang, responden mempunyai pilihan memulakan kausanya sama ada melalui tatacara yang diperuntukkan bawah Bab XXXI KTJ atau melalui tindakan yang diambil olehnya dalam kes ini. Dia mestilah diberi peluang memulakan tindakan di mahkamah sivil sebagai alternatif tatacara yang diperuntukkan bawah Bab XXXI KTJ. Malah, menyusahkan untuknya jika dia mengguna pakai tatacara bawah KTJ dan seterusnya memfailkan tuntutan di mahkamah sivil. Ini sama sekali membuang masa. Mahkamah Tinggi, iaitu mahkamah yang tidak mempunyai had bidang kuasa, mempunyai kuasa inheren membetulkan apa-apa kekhilafan yang melanggar mana-mana undang-undang bertulis dan mengisytiharkan kesahan, atau sebaliknya, apa-apa tindakan yang dikatakan dilakukan atau diambil di bawah kuasa yang diperuntukkan oleh undang-undang. Kebebasan responden telah dicabuli. Penahanannya tidak sah (lihat perenggan 114 & 120).

(4) **(oleh Jeffrey Tan HMP, menyokong)** Oleh kerana responden direman di bawah perintah penghakiman majistret, ini bukanlah tahanan salah. Perintah reman mungkin diguna pakai dengan salah. Mungkin juga tiada kausa munasabah atau asas bagi perintah reman. Perintah reman mungkin diguna pakai atau dikeluarkan tanpa mematuhi s 117 KTJ. Perintah reman mungkin diketepikan. Walau bagaimanapun, kesemua ini tidak penting dalam tuntutan tahanan salah. Ini adalah pendakwaan berniat jahat dan bukan tahanan salah (lihat perenggan 142 & 151–152).]

Notes

For cases on unlawful detention by police, see 12(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 997–1000.

Cases referred to

Attorney General of Trinidad and Tobago v Ramanoop [2006] 1 AC 328, PC (refd)

Austin v Dowling (1870) LR 5 CP 534 (folld)

Bal Krishna v Emperor AIR 1931 Lahore 99 (refd)

Bala Krishnan Appala Naidu v Ketua Inspektor Prabakaran Shanmugam & Ors (No 2) [2010] MLJU 2223; [2011] 2 CLJ 890, HC (refd)

A *Baljeet Singh a/l Katar Singh & Ors v Ng Sek Wah* (Civil Appeal No B-01–124 of 2011) (unreported), CA (refd)
Balkrishnan v Emperor AIR 1931 Lah 99 (refd)
Berry v British Transport Commission [1962] 1 QB 306, CA (refd)
Brown v Chapman (1848) 136 ER 1292; (1848) 6 CB 365 (refd)
B *Calix v Attorney General of Trinidad and Tobago* [2013] 4 All ER 401; [2013] UKPC 15, PC (refd)
Cheow Siong Chin v Menteri Dalam Negeri, Malaysia & Ors [1985] 2 MLJ 95, SC (refd)
Chong Fook Kam & Anor v Shaaban & Ors [1968] 2 MLJ 50, FC (refd)
C *Coghlan v Chief Constable of Cheshire Police and others* [2018] EWHC 34 (QB), QBD (refd)
Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus [1981] 1 MLJ 29, FC (refd)
Datuk James Wong Kim Min Minister of Home Affairs, Malaysia & Ors v Datuk
D *James Wong Kim Min; Re* [1976] 2 MLJ 245, FC (refd)
Datuk Seri Khalid bin Abu Bakar & Ors v N Indra a/p P Nallathamby (the administrator of the estate and dependent of Kugan a/l Ananthan, deceased) and another appeal [2015] 1 MLJ 353, CA (refd)
Educational Co of Ireland Ltd v Fitzpatrick (No 2) [1961] IR 345, SC (refd)
E *Everett v Ribbands and Another* [1952] 2 QB 198, CA (refd)
Harnett v Bond And Another [1925] AC 669, HL (refd)
Harnett v Bond And Another [1924] 2 KB 517, CA (refd)
Hashim bin Saud v Yahaya bin Hasim & Anor [1977] 1 MLJ 259 (refd)
Kable v State of New South Wales [2012] NSWCA 243, SC (refd)
F *Karpal Singh v Sultan of Selangor* [1988] 1 MLJ 64 (refd)
Ketua Polis Daerah Johor Bahru, Johor & Ors v Ngui Tek Choi [2013] 4 MLJ 504, CA (refd)
Ketua Polis Negara & Ors v Nurasmira Maulat bt Jaafar & Ors (minors bringing the action through their legal mother and next friend Abra bt Sahul Hamid) and
G *other appeals* [2018] 3 MLJ 184; [2018] 1 CLJ 585, FC (refd)
Lai Kim Hon & Ors v PP [1981] 1 MLJ 84, FC (refd)
Leonard Teoh Hooi Leong v PP [2010] 3 MLJ 373, CA (refd)
Lim Kit Siang v Dato Seri Dr Mahathir Mohamad [1987] 1 MLJ 383; [1987] CLJ Rep 168, SC (refd)
H *Lock v Ashton* (1848) 116 ER 1097; (1848) 12 QB 871, KB (refd)
Madjai bin Sanusi v Pengarah Imigresen, Johor & Ors [2000] 5 MLJ 116, HC (refd)
Masa ak Nangkai & Ors v Sgt Edwin Nancha & Anor [2005] 1 MLJ 581, HC (refd)
I *Mohamed Lajan v Daud* [1963] 1 MLJ 209 (refd)
PP v Audrey Keong Mei Cheng [1997] 3 MLJ 477, CA (refd)
Pyx Granite Co Ltd v Ministry of Housing and Local Government and Another [1958] 1 QB 554, CA (refd)
QIW Retailers Ltd v Felview Pty Ltd [1989] 2 Qd R 245 (refd)

R (on the application of Lumba) v Secretary of State for the Home Department; R (on the application of Mighty) v Secretary of State for the Home Department [2011] 4 All ER 1; [2011] 2 WLR 671, SC (refd)
Russian Commercial and Industrial Bank v British Bank for Foreign Trade, Limited [1921] 2 AC 438, HL (refd)
Saul Hamid bin Pakir Mohamad v Inspector Abdul Fatah bin Abdul Rahman & Anor [1999] 6 MLJ 800, HC (refd)
Shri DK Basu, Ashok K Johri v State of West Bengal [1997] AIR SC 610, SC (refd)
Syed Mohammad b Syed Isa; Mohd Rosdi b Jaafar; Thiagarajah a/l Palaniandy; Rajis a/l Seeni Din & Ors; Re: [2001] MLJU 163, HC (refd)
The Detention of R Sivarasa & Ors; Re [1996] 3 MLJ 611, HC (refd)
Warner v Riddiford (1858) 4 CBNS 180 (refd)
West v Smallwood (1838) 3 M & W 418; (1838) 150 ER 1208 (refd)
Wong Kok San v WH Salt [1952] 1 MLJ 204 (refd)
Zenati v Commissioner of Police of the Metropolis and another [2015] 2 WLR 1563, CA (folld)

Legislation referred to

Civil Law Act 1956 ss 7, 8, 8(2)
Courts of Judicature Act 1964 s 14
Courts Ordinance 1948 s 107
Criminal Procedure Code s 23, 117, 117(1), 119, 119(1), 323, Chapter XXXI
Criminal Procedure Code [IND] s 167
Federal Constitution art 5
Penal Code ss 304A, 330, 331
Police Act 1967 s 32
Road Traffic Ordinance (repealed by the Road Transport Act 1987) s 34A

Appeal from: No M-01(NCVC) (W)-17–01 of 2014 (Court of Appeal, Putrajaya)

Kamal Azira Hassan (Zureen Elina bt Hj Mohd Dom with him) (Senior Federal Counsel, Attorney General's Chambers) for the appellants.
J Amardas (Terence Chan Yoong Tian with him) (KP Ng & Amardas) for the respondent.
Salim Bashir (Bar Council Malaysia) amicus curiae.

Balia Yusof FCJ (delivering majority judgment of the court):

BACKGROUND FACTS

[1] This is a case of custodial assault and police brutality against a man who was suspected to be involved in a crime which never was. The respondent

herein, had, in the early hours of 22 November 2008 accompanied his friend, one Abdul Manan b Hasan ('SP4') to the Ibu Pejabat Polis Kontinjen ('IPK') Melaka. It was about 4am. Earlier, at about 3.30am while they were enjoying themselves at the Rally Club, Melaka, SP4 received a phone call from an unidentified police personnel asking him to come over to the IPK. In the said phone conversation, SP4 was asked whether he was involved in a fight involving a police officer at a restaurant in MITC Melaka. SP4 was directed to see a police officer by the name of Hassan bin Marsom, the first appellant herein.

[2] At the IPK, SP4 went in to see the first appellant while the respondent waited at the guardhouse. About half an hour later, the respondent was brought to the second appellant's room and later into a room where there were plain clothed police personnels. He was blindfolded, stripped and assaulted despite his denial on his involvement in a fight which purportedly had taken place at a restaurant in MITC Melaka.

[3] Later in the morning, the respondent was produced before the magistrate for a remand order under s 117 of the Criminal Procedure Code ('the CPC'). A remand order for a period of seven days from 22–29 November 2008 was obtained from the magistrate by the third appellant. Thereafter, the respondent together with four other detainees including SP4, were brought to the Balai Polis Melaka Tengah lock up. One Corp Nasir b Jaafar ('SP10') noticed injuries suffered by the respondent and ordered him to be brought to the hospital. Together with three other suspects, the respondent was taken to the Melaka General Hospital at about 7pm where he was hospitalised for seven days from 22–29 November 2008.

[4] While still at the hospital, on 28 November 2008, the respondent's remand order was extended for another seven days until 5 December 2008 on which day he was released from police custody.

[5] The result of the police investigation revealed that the respondent was not involved in the fight at the restaurant in MITC Melaka and accordingly no charges were brought against him.

[6] As a result the assault, the respondent suffered injuries and complaint of shortness of breath and chest pain.

[7] The respondent filed a claim in the High Court against the appellants herein claiming for general and special damages as well as exemplary and/or aggravated damages for the unlawful detention and the pain and suffering he had undergone during the ordeal.

[8] In his amended statement of claim, the respondent also prayed for a declaration that his detention between 22 November–5 Decmeber 2008 was unlawful and a further declaration that his rights under art 5 of the Federal Constitution had been breached.

PROCEEDINGS IN THE HIGH COURT

[9] At the end of the trial, the learned judicial commissioner ('JC') of the Melaka High Court found the first, second, third, fourth and seventh appellants liable and awarded damages to the respondent. The seventh appellant was held to be vicariously liable for the acts of the first to fourth appellants. They are only liable for the injuries suffered by the respondent while in police custody. The award runs:

(a)	damages for injuries suffered	RM60,000
(b)	exemplary damages	RM50,000
(c)	aggravated damages	RM50,000
(d)	special damages	RM100
	total	RM160,100

Interest at 4%pa on the said amount was also ordered from 22 November 2008 to date of payment.

[10] The learned JC however, did not allow the declaration sought by the respondent.

[11] In refusing the declaration sought by the respondent, the learned JC had merely stated that the remand order was properly issued by the magistrate, hence, the detention of the respondent was legal.

[12] The learned JC cited and followed the decision of the Court of Appeal in *Ketua Polis Daerah Johor Bahru, Johor & Ors v Ngui Tek Choi* [2013] 4 MLJ 504, a decision which we will revert to in the later part of this judgment.

[13] Dissatisfied with the learned JC's decision refusing the declaration, the respondent lodged an appeal to the Court of Appeal and the issue raised were as follows:

(a) that the quantum of damages ordered in his favour for assault and pain and suffering was grossly inadequate considering the seriousness of the injuries suffered; and

(b) that the learned JC had erred in not declaring that his detention was unlawful.

A PROCEEDINGS IN THE COURT OF APPEAL

[14] At the Court of Appeal, the main contention of the respondent was that the two remand orders were wrongfully obtained by the police and without sufficient cause and as such the detention must be declared to be unlawful. Consequently, further damages, including exemplary damages ought to be allowed for such unlawful detention.

[15] In support of his contention that the remand orders were invalid and that his detention was therefore unlawful, the respondent contended:

(a) that his initial arrest by the first appellant was made without proper instruction;

(b) the first remand order was obtained from the magistrate without sufficient basis or grounds to indicate even a reasonable suspicion to implicate him in the crime;

(c) the extended remand order was wrongly issued as the magistrate was being misled into issuing the same;

(d) there was non compliance and a breach of ss 117 and 119 of the CPC.

[16] The appellants on the other hand contended that the remand orders obtained were lawful and were in compliance with the provisions of the law namely, ss 117 and 119 of the CPC. The magistrate exercising his powers under the provisions of the CPC was performing a judicial act and the police in detaining the respondent were merely following a lawful order issued by the court. A civil court is precluded from challenging the validity of the remand order. It was further contended that s 32 of the Police Act 1967 affords protection to the appellants.

[17] The Court of Appeal dismissed the respondent's appeal on the issue of damages and the decision of the learned JC on the quantum of damages awarded was affirmed but allowed his appeal on the declaration sought.

[18] In allowing part of the respondent's appeal and granting the declaration sought, the Court of Appeal ruled at para 44 of its judgment as follows:

> 44. It was our unanimous view therefore that the appellant had made out a case for the declaration sought, namely, that his detention by the police from 22 November–5 December 2008 was unlawful and he was entitled to be compensated with damages for being denied of his liberty and freedom during that period (apart from the injuries, pain and suffering he was subjected to during that detention, for which he had been awarded damages affirmed above). It was obvious to us that the learned trial judge had not given sufficient consideration to all the surrounding facts in evidence before him. His Lordship had misdirected himself on

the law too, in dismissing the further prayer for a declaration that the appellant's detention had been unlawful and refusing to allow consequential orders for damages.

[19] For the said unlawful detention, the Court of Appeal awarded a sum of RM50,000 as general damages and another RM50,000 as exemplary damages.

THE QUESTION OF LAW

[20] Leave to appeal to this court was granted to the appellants on 29 August 2016 on a question of law which reads as follows:

Whether damages for false imprisonment can be awarded for detention under an Order of the Magistrate under section 117 of the Criminal Procedure Code.

THE APPELLANTS' SUBMISSIONS

[21] Maintaining the stance taken in their defence, the appellants submit that the detention of the respondent is valid in law. The first detention, that is the first 24 hours is valid in law because he was arrested upon a reasonable suspicion that he was involved in the fight at the restaurant in MITC Melaka. As to the subsequent detention under s 117 of the CPC and its extension thereafter, it was submitted that the detention is lawful by virtue of the fact that it was a lawful order of the magistrate allowing the police's application under the said provision.

[22] Both proceedings before the magistrate on 22 November 2008 for the first remand order and the subsequent proceeding on 28 November 2008 for an extension of the remand order were made for purposes of completing the investigation. The process and the procedure adopted by the police in applying for the said remand order and its extension were carried out in compliance with and in accordance with provisions of the law, namely, ss 117 and 119 of the CPC.

[23] The learned senior federal counsel, appearing on behalf of the appellants further submitted that the remand orders issued by the magistrate constitutes a judicial act and as such no claim for damages could lie citing the case of *Chong Fook Kam & Anor v Shaaban & Ors* [1968] 2 MLJ 50 as an authority to support his contention. Reliance was also placed on the provisions of s 14 of the Courts of Judicature Act 1964.

[24] The remand orders under s 117 of the CPC issued against the respondent had never been set aside and neither was there any appeal or a revision made pursuant to the provisions of Chapter XXXI of the CPC. Until set aside or appealed against, the remand orders remain valid and good in law.

Whether the remand orders were obtained from the magistrate upon sufficient cause has been shown or whether the magistrate was misled in so issuing the orders are questions of facts which must be established in proceedings pursuant to the provisions of Chapter XXXI of the CPC. It is never the function of the court in a civil claim for unlawful detention to go behind the remand order and to question its legality and/or the manner in which it was obtained.

[25] Section 32 of the Police Act 1967 should come in aid of the appellants' action. The said provision gives protection to the police in carrying out their duties pursuant to a warrant issued by a competent authority. The respondent, it was submitted, was detained in obedience of the lawful order of the magistrate, a competent authority within the meaning of s 32 of the Police Act 1967.

[26] Finally, it was submitted that the respondent's action is clearly an abuse of the court's process and an award of damages for a detention under s 117 of the CPC ought not to be allowed.

THE RESPONDENT'S SUBMISSION

[27] Learned counsel for the respondent submitted that there are three stages of the detention, the first of which is the period between the time of arrest at around 5am on 22 November 2008 and 11am, when the first remand order was obtained. The second part of the detention covers the period during the first remand order that is between 22–28 November 2008 while the third part of the detention covers the period between 28 November–5 December 2008 covering the period under which the respondent was detained under the second remand (ie the extension remand order) obtained by the police at the Melaka General Hospital.

[28] As to the first detention, the respondent contended that he was detained by Cpl Hassan ('the first appellant') without any basis. Section 23 of the CPC had not been satisfied. The evidence proffered by the first appellant on his arrest showed that it was made without any basis.

[29] With regard to the second and third stages of the detention, the respondent submitted that the provisions of ss 117 and 119 of the CPC were not complied with. The police had failed to follow the strict requirements of the said provisions. It was further submitted that the magistrate had been misled into issuing the remand orders upon application made by the third and fourth appellants.

[30] The unlawful detention of the respondent is in violation of his constitutional rights accorded by art 5 of the Federal Constitution and the

appellants cannot hide under the cloak of s 32 of the Police Act 1967 and seeking protection under the said provision. Section 32 is never intended to provide protection for any unlawful acts of the police.

[31] A court of unlimited jurisdiction has an inherent power to set aside any order and correct any wrong that has been done in breach of any written law. In a case like the instant, where a breach of the provisions of ss 117 and 119 of the CPC is alleged, the respondent being aggrieved, must be allowed to bring a collateral proceeding to challenge the same as an alternative to the procedures provided in Chapter XXXI of the CPC.

DECISION

Whether the arrest was lawful

[32] In the appellants' written submission, it was submitted that the arrest and subsequent detention of the respondent was lawful. Although acknowledging that the Respondent's challenge on his arrest and detention is threefold, namely, the initial arrest, the first detention order and the second remand order, no submission was made by the Appellants as to the initial arrest itself. The respondent contended that he was arrested without any basis and that s 23 of the CPC had not been satisfied.

[33] Section 23 of the CPC as relevant to this appeal deals with the powers of a police officer to arrest without an order of a magistrate and without a warrant. It provides:

> 23 When police or penghulu may arrest without warrant.
>
> (1) Any police officer or penghulu may without an order from a Magistrate and without a warrant arrest
>
> (a) any person who has been concerned in any offence committed anywhere in Malaysia which is a seizable offence under any law in force in that part of Malaysia in which it was committed or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned;
>
> (b) ...;
>
> (c) ...

[34] In its ground of judgment, we note that the Court of Appeal had made an oblique reference to the issue of the respondent's arrest wherein it was stated:

> 32. Counsel for the Appellant also referred to us the decision in *Masa ak Nangkai & Ors v Sgt Edwin Nancha & Anor* [2005] 1 MLJ 581 where the court held that the

question whether there was wrongful arrest and detention would very much depend on whether the police had acted within the provision of s 23(1)(a) of the CPC and to rely on that section the police had to show they had reasonable or probable cause to effect the arrest in that they had received credible information or held a reasonable suspicion as to the commission of an offence. It was argued that a similar criterion applied when applying for a remand order to facilitate further investigation.

[35] In our considered view, the above cited passage of the Court of Appeal's judgment merely reiterated that the test of whether or not there was a reasonable suspicion as to the commission of the offence would also be applied when applying for a remand order.

[36] Before the learned JC too, the issue of whether the arrest was lawful or otherwise was never dealt with. Focus was given more to the detention itself. Be that as it may, we are in agreement with the Court of Appeal that whether there was wrongful arrest or not depends on whether the police had reasonable or probable cause to effect the arrest on the respondent which depends on whether the police had credible information or held a reasonable suspicion as to the commission of the offence. The case of *Masa ak Nangkai & Ors v Sgt Edwin Nancha & Anor* [2005] 1 MLJ 581 cited in the Court of Appeal's judgment explains the requirements of s 23 of the Police Act 1967 on such power of arrest by the police (see also: *Saul Hamid bin Pakir Mohamad v Inspector Abdul Fatah bin Abdul Rahman & Anor* [1999] 6 MLJ 800).

[37] We are constrained to hold that since the issue of whether the initial arrest was lawful or otherwise was never brought up in the courts below, it would not be open to the respondent to bring it up at this stage before us. Both the High Court and the Court of Appeal dealt only with the issue on the s 117 detention. It is only before us now that the respondent is raising the so called threefold attack which brings in the issue of his initial arrest. In fact, this aspect of the argument is not within the ambit of the question posed.

Whether the detention under the remand orders is valid

[38] The respondent's action against the appellants is based on a claim for false imprisonment arising from an unlawful detention. While the contention of the appellants is that the detention is lawful, the respondent alleges otherwise. His detention was under s 117 of the CPC. Thus, the core issue is simply whether the detention of the respondent under the said provision of the CPC is lawful.

[39] On the validity of the remand orders, the Court of Appeal had embarked on the exercise of determining whether those remand orders had

been obtained from the magistrate(s) upon sufficient cause being shown or whether the judicial officer(s) concerned had been misled in issuing the same.

[40] In his pleadings, the respondent had specifically pleaded that the remand orders were obtained without complying with the provisions of the law (*tidak mematuhi keperluan undang-undang*) and also that the magistrate issuing the said remand orders were not informed of the true facts on the investigation of the case (*tidak memberitahu majistret berkenaan berhubung dengan fakta-fakta sebenar mengenai penyiasatan kes berkenaan*). Those were his allegations.

[41] Section 117 of the CPC merits reproduction and it provides as follows:

117 Procedure where investigation cannot be completed within twenty-four hours.

(1) Whenever any person is arrested and detained in custody and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 28 and there are grounds for believing that the accusation or information is well founded, the police officer making the investigation shall immediately transmit to a Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case and shall at the same time produce the accused before the Magistrate.

(2) The Magistrate before whom an accused person is produced under this section may, whether he has or has no jurisdiction to try the case, authorize the detention of the accused in such custody as follows:

(a) if the offence which is being investigated is punishable with imprisonment of less than fourteen years, the detention shall not be more than four days on the first application and shall not be more than three days on the second application; or

(b) if the offence which is being investigated is punishable with death or imprisonment of fourteen years or more, the detention shall not be more than seven days on the first application and shall not be more than seven days on the second application.

(3) The officer making the investigation shall state in the copy of the entries in the diary referred to in subsection (1), any period of detention of the accused immediately prior to the application, whether or not such detention relates to the application.

(4) The Magistrate, in deciding the period of detention of the accused shall take into consideration any detention period immediately prior to the application, whether or not such detention relates to the application.

(5) The Magistrate in deciding the period of detention of the accused shall allow representations to be made either by the accused himself or through a counsel of his choice.

(6) If the Magistrate has no jurisdiction to try the case and considers further detention unnecessary he may order the accused person to be produced

before a Magistrate having such jurisdiction or, if the case is triable only by the High Court, before himself or another Magistrate having jurisdiction with a view to transmission for trial by the High Courts.

(7) A Magistrate authorizing under this section detention in the custody of the police shall record his reasons for so doing.

[42] We are replete with authorities which explain the mechanics of s 117 of the CPC and we will examine some of them in the following manner.

[43] Strict compliance with the provisions of s 117 of the CPC was explained by Vohrah J (as he then was) in the case of *Re The Detention of R Sivarasa & Ors* [1996] 3 MLJ 611. The facts in *Sivarasa* as summarised in the report may be stated as follows: On 9 November 1996, 67 people were arrested by the police in an alleged demonstration which took place at Asia Hotel, Kuala Lumpur. The suspects were remanded under s 117 of the Criminal Procedure Code (FMS Cap 6) ('the CPC') from 10–13 November 1996. An application was then made to the magistrate for an extension of the detention period of ten suspects under s 117 of the CPC for another ten days ie from 13–22 November 1996. Under the heading 'Alasan-Alasan' in the application it was indicated, inter alia, that the application had to be made as the detention period was too short and was insufficient for the police to complete investigation. The magistrate stated at the end of her notes of proceedings that she was satisfied with the reasons as appeared in the application, and also in the investigation diary that was given. She went on to allow the application for the extension of detention. Apparently, the investigation diary that had been referred to by the magistrate consisted of three sheets of typewritten paper, which had the heading 'Pergerakan Soalsiasat Tahanan' and a timetable of when the ten suspects were being taken out from and being sent back to the cells where they were detained. In the afternoon of 13 November 1996, an urgent application for the revision of the magistrate's remand order under s 323 of the CPC was filed in the High Court. The complaint was that the omnibus remand order made on the ten persons by the magistrate was not in compliance with s 117 of the CPC.

[44] In exercising his revisionary powers under s 323 of the CPC, the learned judge set aside the remand order made by the magistrate and held:

(1) From the record of proceedings and the documents which the magistrate purported to rely on, it was clear that the magistrate had not appreciated the strict nature of s 117 of the CPC and the case on the matter.

(2) Pursuant to s 117 of the CPC, the police officer has a mandatory duty to transmit to a magistrate a copy of the entries in the diary as prescribed under s 119 of the CPC when producing a suspect before him.

(3) In this case, no copy of the entries in the diary was transmitted to the magistrate. This was fatal to the application for extension of detention, as it meant that the magistrate did not have the prescribed material (especially that referred to in s 119(1)(d) to act upon in her judicial enquiry whether to order further remand.

(4) The three sheets of paper produced in this case did not contain copies of 'entries in the diary' as prescribed under s 119, and certainly did not relate to 'the day by day' proceedings of the officer making the police investigation which were entered into his diary. Also, the timetable listed in the papers could not be considered as copies of the entries prescribed under s 119.

(5) Section 117 of the CPC also requires that there be grounds for believing that the accusation or information is well founded for the police officer to make his application for detention. These grounds are subject to judicial scrutiny. It has to be stressed that a magistrate ought not give a remand order in police custody without his satisfying himself as to its necessity and that the period of remand ought also to be restricted to the necessities of the case. If the necessities of the case for remand or further remand are not known, no remand order should be made; *Bal Krishna v Emperor* AIR 1931 Lah 99 followed.

(6) The liberty of an individual after arrest is at stake and art 5(4) of the Federal Constitution reposes an onerous judicial duty on a magistrate to decide whether a person should be detained or detained further.

(7) The application for extension of detention was an omnibus application for the detention of 10 named persons, and there was no condescension to details as to what each of them was arrested for and why it was necessary to extend the remand of each of them. Whatever vague reasons shown on the application (which did not show any nexus between the suspects and a suspected offence or offences) for the continued detention of each of them were without any foundation.

(8) Section 28 and 117 have been inserted into the CPC for a good reason, so that the detention by the police of a person beyond 24 hours after his arrest is not as a result of an executive act but as a result of a judicial decision in consonance with art 5(4) of the Federal Constitution. It was unfortunate that the magistrate did not advert to what was required of her under s 117.

[45] The format of the diary referred to under s 117(1) of the CPC must be in accordance with the provisions of s 119 of the CPC which provides:

119 Diary of proceedings in investigation.

(1) Every police officer making a police investigation under this Chapter shall day by day enter his proceedings in the investigation in a diary setting forth:

(a) the time at which the order, if any, for investigation reached him;

(b) the time at which he began and closed the investigation;

(c) the place or places visited by him; and

(d) a statement of the circumstances ascertained through his investigation.

(2) Notwithstanding anything contained in the Evidence Act 1950, an accused person shall not be entitled, either before or in the course of any inquiry or trial, to call for or inspect any such diary:

Provided that if the police officer who has made the investigation refers to the diary for the purposes of section 159 or 160 of that Act, such entries only as the officer has referred to shall be shown to the accused, and the Court shall at the request of the officer cause any other entries to be concealed from view or obliterated.

[46] The duty of the police officer to transmit to the magistrate a copy of the entries in the diary in applying for a remand order is a mandatory requirement of s 117(1) of the CPC. Not only the diary must be in the form as specified in s 119 of the CPC but it must also be accompanied with grounds indicating that the information against the accused person is well founded.

[47] Delivering the judgment of the Court of Appeal in *Public Prosecutor v Audrey Keong Mei Cheng* [1997] 3 MLJ 477, Shaik Daud JCA at p 482 of the report had the following to say on the linkage between ss 117 and 119 of the CPC:

> Section 119 of the CPC provides that the police officer making the investigation shall forthwith transmit to the magistrate 'a copy of the entries in the diary hereinafter prescribed relating to the case and shall at the same time produce the accused before such magistrate'. The diary herein mentioned, has been prescribed in s 119 of the CPC which provides that every police officer making a police investigation shall day by day enter his proceedings in the investigation in a diary setting forth the time at which the order, if any, for investigations reached him, the time at which he began and closed investigation, the place or places visited by him and a statement of the circumstances ascertained through his investigation. Section 117 of the CPC makes it mandatory for the police officer seeking a detention order of an arrested person to produce a copy of such a diary, failing which a magistrate ought not to entertain the application.
>
> In the present case, let us examine whether the provisions of s 117 of the CPC has in fact been complied with. It cannot be gainsaid that where the liberty of a citizen is to be curtailed, the law must be adhered to strictly. The record in the present case, shows that no such copy of the diary, as envisaged by s 117 of the CPC, was produced before the registrar. What was in fact produced was a letter dated 12 May 1994, addressed to the magistrate from Latt Mastura bte Mansor from Cawangan Siasatan Jenayah Perdagangan, Bukit Aman setting forth the facts upon which a detention order was requested for. The fact that a letter was produced before the

registrar, was conceded by the learned deputy public prosecutor both in the High Court and in this appeal. He further conceded that it was not a copy of the diary as envisaged by s 117 of the CPC.

In our judgment, it is mandatory for the police to produce a copy of the diary as prescribed by s 119 of the CPC. The details in such a diary would provide a true picture of the proceedings in the investigation in compliance with s 119 of the CPC. Since the police, in this case, failed to do this, the registrar would be right, in law, to refuse to order the further detention of the respondent. Furthermore, on our perusal of the contents of the 'letter', we find that nowhere has it been shown that the respondent has committed or been involved in any offence to justify her further detention in order to complete the investigation. On the contrary, the information shows that she would, in all probability, only be a potential witness against her husband. We would, without hesitation, hold that it would be an abuse of the process of law for police officers to use the machinery of s 117 of the CPC to compel witnesses or potential witnesses to come forward to assist them in their investigations. There are other provisions in the CPC for this purpose.

[48] It was held by the Court of Appeal in *Audrey Keong* that s 117 of the CPC had not been remotely complied with. So was the three sheets of papers titled 'Pergerakan Soalsiasat Tahanan' (suspects' interrogation movement) in *Sivarasa* showing a timetable of the times the ten suspects were taken out and brought in to the cells where they were detained were held to be not to contain copies of 'entries in the diary' as envisaged under s 119 of the CPC.

[49] Both *Sivarasa* and *Audrey Keong* were cited with approval by Raus Sharif JCA (as he then was) in another Court of Appeal case of *Leonard Teoh Hooi Leong v Public Prosecutor* [2010] 3 MLJ 373 wherein His Lordship had stated at pp 380–381 as follows:

[17] The main issue in this case is whether the detention of the appellant under s 117 of the CPC was lawful. The working of s 117 of the CPC is well settled (see *Re the detention of R Sivarasa & Ors* [1996] 3 MLJ 611; *Public Prosecutor v Audrey Keong Mei Cheng* [1997] 3 MLJ 477). Section 117 of the CPC requires the police to produce a copy of the investigation diary before the magistrate as prescribed by s 119 when producing a suspect. The diary must provide a true picture of the proceedings in the investigation. If the magistrate upon perusal of the entire diary was satisfied that there were grounds for believing that the accusation or information against the suspect was well founded and it was necessary for the purpose of the investigation to remand him, then the magistrate would have to make the remand order. As to the length of the remand order, it is within the discretion of the magistrate, who has to decide based on the nature and circumstances of each case provided that the detention shall not exceed 15 days in the whole as stated in the then s 117(2) of the CPC.

[18] In *Re The Detention of R Sivarasa & Ors* KC Vohrah J (as he then was) held that the failure to transmit to the magistrate a copy of the entries was fatal to the application before the magistrate as it meant that the magistrate did not have the prescribed material to act upon her judicial enquiry whether to order for further

A remand. Similarly, in *Public Prosecutor v Audrey Keong Mei Cheng*, Shaikh Daud JCA held that since the police failed to produce a copy of the diary as prescribed by s 119 of the CPC, the registrar was right to refuse to order further detention of the respondent.

[19] We endorse the above views ...

B

[50] In considering an application for a remand order, a magistrate must balance fairly between the right of a personal liberty of an individual who has not been proven guilty of an offence, against the equally important public interest vis a vis the duty of the police to investigate crimes. It involves an C exercise of discretion and that discretion must be exercised judicially and is subject to the court's scrutiny (*Hashim bin Saud v Yahaya bin Hasim & Anor* [1977] 1 MLJ 259 and *Chong Fook Kam & Anor v Shaaban & Ors* [1968] 2 MLJ 50). KC Vohrah J in *Re Detention of R Sivarasa & Ors* said:

D Section 117 also requires that there be grounds for believing that the accusation or information is well founded for the police officer to make his application for detention. These grounds, needless to say, are subject to judicial scrutiny.

[51] Harun J (as he then was) in *Hashim bin Saud v Yahya bin Hasim* had E spoken of the task of a magistrate issuing a remand order in the following words:

The purpose of a detention under s 117 of the CPC therefore is to enable the police to complete investigations. The detention itself is subject to judicial control. The power to detain rests squarely and fully on the magistrate not the police. The F magistrate is required to satisfy himself on every occasion if detention is at all necessary and if so to determine the length of time actually required to complete the investigation — s 117(ii) of the CPC. If he orders detention he must record his reasons for doing so — s 117(iii) of the CPC. To enable the magistrate to make the decision whether to detain or not the police must supply the magistrate a copy of the investigation diary — s 117(i) of the CPC. This copy of the investigation diary to G be transmitted to the magistrate must contain all the particulars as required under s 119 of the CPC, that is to say, *the police must tell the magistrate all they know so far up to time of application and not what they think the magistrate need only know* ... (Emphasis added.)

H

[52] Speaking on the same subject matter in dealing with s 167 of the Indian Criminal Procedure Code, an equipollent provision to s 117 of the CPC, Bhide J in *Bal Krishna v Emperor* AIR 1931 Lahore 99 stated:

I It is to be regretted that Magistrates frequently fail to realize their responsibility in the matter, though the law and the High Court rules on the subject are perfectly clear. S 167, Criminal PC, requires a Magistrate remanding an accused person to police custody to state his reasons in writing. This provision has not been complied with in the present instance. If the Magistrate had cared to study the diaries, as it was their duty to do before granting a remand, they would not have, I think, failed to discover that there was no legal justification for remanding the accused to police

custody after the expiry of the first remand. I would also take the opportunity to invite attention to the rules on the subject in Chap 6, Vol II of the Rules and Orders of the High Court in which the subject has been dealt with at great length and stress had been laid on the great care necessary in remanding accused persons to police custody. It will appear from these instructions that a remand to police custody ought not to be granted by a Magistrate without satisfying himself as to its necessity and the period of remand ought also to be restricted to the necessities of the case.

[53] To ensure uniformity and strict compliance with the requirements of the provisions in s 117 of the CPC, a practice direction dated 2 January 2003 was issued by the then Chief Justice Tun Mohamed Dzaiddin titled Arahan Amalan Ketua Hakim Negara Bil 3/2003 Perintah Penahanan Di bawah Seksyen 117 Kanun Prosedur Jenayah (KPJ), effective from 2 January 2003. For ease of reference, we reproduce below the said practice direction:

KETUA HAKIM NEGARA

KAMAR
KETUA HAKIM NEGARA
MAHKAMAH PERSEKUTUAN
MALAYSIA

KHN 007

2 Januari 2003

Y.A-Y.A. Hakim/Pesuruhjaya Kehakiman
Hakim Mahkamah Tinggi
Seluruh Malaysia

Semua Hakim Kanan/Hakim
Mahkamah Sesyen
Seluruh Malaysia

Semua Majistret
Seluruh Malaysia

Semua Pendaftar
Mahkamah Sesyen/Majistret
Seluruh Malaysia

Y.A-Y.A. Datuk/Datuk Wira/Dato'/Y.Bhg. Dato'/Tuan/Puan,

ARAHAN AMALAN KETUA HAKIM NEGARA BIL. 3/2003
Perintah Penahanan di bawah seksyen 117
Kanun Prosedur Jenaah (KPJ)

Setelah berunding dengan Y.A.A. Hakim Besar Malaya dan Y.A.A. Hakim Besar Sabah dan Sarawak, saya dengan ini mengelurkan arahan seperti berikut:

2. Bagi memastikan keseragaman amalan dan untuk mempertingkatkan pematuhan kehendak seksyen 117 Kanun Prosedur Jenayah (KPJ) di seluruh Malaysia, prosedur-prosedur berikut hendaklah diikuti:-

(i) Seorang pegawai polis yang memohon perintah di bawah seksyen 117 KPJ henddaklah mengemukakan kepada Majistret:

A

a) Orang yang disyaki; dan

b) Dua Salinan catitan diari siasatan di bawah seksyen 119 KPJ yang berkaitan dengan kes tersebut.

B (ii) Sebelum pendengaran sesuatu permohonan, Majistret hendaklah bertanya orang yang disyaki samada beliau:

a) Telah diberi peluang untuk mendapatkan atau menghubungi peguam; atau

b) Ingin diwakili oleh peguam.

C (iii) Sekiranya orang yang disyaki:

a) ingin diwakili oleh peguam, Majistret hendaklah mendengar jika terdapat bantahan terhadap perwakilan tersebut dan mempertimbangkannya. Beban untuk membuktikan samada hak kepada pegiam ini akan menghalang siasatan adalah terletak kepada D pihak polis. Satu tempoh reman pendek boleh diberikan dengan syarat dia diberi peluang untuk mendapatkan peguam. Peguam yang dilantik mestilah dipersetujui oleh orang yang disyaki.

E b) tidak ingin diwakili oleh peguam, Majistret hendaklah terus mendengr permohonan tersebut.

(iv) Pada permulaan pendengrah permohonan itu, Majistret hendaklah menentukan samada permohonan ini adalah permohonan baru atau permohonan lanjut. Sebelum sesuatu permohonan dibenarkan, Majistret mesti F mengambil kira alasan-alasan yang diberi termasuk alasan di dalam perintah tersebut.

(v) Sekiranya Majistret membenarkan penahanan, beliau hendaklah:

a) mencatitkan di dalam diari sebab-sebab penahanan dibuat;

G b) mengembalikan satu Salinan kepada pegawai penyiasat; dan

c) memfailkan satu lagi Salinan di dalam fail Mahkamah dengan ditandakan "Perintah penahanan di bawah Seksyen 117 KPJ" dan fail tersebut hendaklah dinomborkan mengikut tahun.

H (vi) Apabila seseorang di bawah perintah penahanan dilepaskan atau diberi jaminan, pegawai penyiasat hendaklah memaklumkan kepada Majistret dengan mengisi borang seperti **Lampiran 1**. Borang tersebut mestilah difailkan bersama-sama dengan perintah tahanan tersebut.

I (vii) Setiap perintah tahanan yang telah dikeluarkan hendaklah dibawa kepada perhatian Majistret pada tarikh orang yang disyaki itu dilepaskan. Sekiranya tiada borang perlepasan dikemukakan pada tarikh tersebut, Majistret hendaklah mengarahkan pegawai penyiasat yang berkenaan memfailkan borang seperti **Lampiran 1**.

(viii) Majistret hendaklah menyediakan dan menghantar penyata bulanan perintah-perintah tahanan dengan mengisi borang **Lampiran 2** kepada Hakim Utama Mahkamah Tinggi dan sesalinan kepada Ketua Pendaftar Mahkamah Persekutuan.

(ix) Sekiranya Majistret tidak dapat mendengar permohonan perintah tahanan, Hakim Mahkamah Sesyen, Pendaftar Mahkamah Rendah atau mana-mana pegawai lain seperti yang disenaraikan di bawah jadual Keempat Akta Mahkamah Rendah 1948 boleh mendengar permohonan tersebut.

(x) Bagi pegawai penjawat awam di negeri-negeri seperti yang disenaraikan di bawah Jadual Keempat Akta Mahkamah Rendah 1948 yang mendengar permohonan perintah tahanan, prosedur yang telah digariskan di atas adalah terpakai. Setelah membuat perintah tersebut, pegawai tersebut adalah dikehendaki mengemukakan dengan segera Salinan perintah yang dibuat olehnya kepada Majistret Daerah berkenaan.

(xi) Perintah tahanan yang diberikan oleh pegawai tersebut hendaklah tidak melebihi 3 hari kecuali bagi Mahkamah Litar di negeri Sabah dan Sarawak. Sekiranya tahanan lanjut difikirkan perlu selepas tamat tempoh 3 hari, pegawai polis yang berkenaan hendaklah mengemukakan orang yang disyaki di hadapan majistret Daerah itu atau Majistret yang berhampiran.

3. Pekeliling Ketua Pendaftar 1/79, Pekeliling Ketua Pendaftar 5/79 dan Pekeliling Pendaftar 1/95 adalah dibatalkan.

4. Arahan Amalan ini berkuatkuasa mulai 2 Januari 2003.

(TUN MOHAMED DZAIDDIN BIN HAJI ABDULLAH)

LAMPIRAN 1

*Majistret,

.....

Perintah penahanan di bawah seksyen 117 KAJ No. 2002

Adalah dimaklumkan orang yang ditahan bernama ..... No KP ..... yang dalam tahanan polis menurut perintah tersebut di atas telah:

*i. Dilepaskan tanpa syarat pada ..... jam .....pg/mlm

ii. Dilepaskan atas jaminan pada ..... jam .....pg/mlm mengikut syarat-syarat berikut

.....

iii. Dituduh di Mahkamah Majistret / Sesyen / Mahkamah Tinggi di bawah seksyen ..... dalam kes .....*

(t.t.)

.....

(nama)

*Sila isikan bahagian yang berkenaan sahaja.

[54] A standard format of minuting for an application of remand order under s 117 of the CPC was introduced by the Pekeliling Pendaftar Mahkamah Tinggi Malaya Bil 1 Tahun 2011 on Prosiding Reman di Mahkamah Majistret di Semenanjung Malaysia. By the said circular a new format of minuting, replacing whatever existing format in existence was introduced as shown in *Lampiran* A of the said circular. Once again, for ease of reference, we take the liberty to reproduce the said circular together with its *Lampiran* A as follows:

LAMPIRAN 2

PENYATA BULANAN PERINTAH TAHANAN DI BAWAH SEKSYEN 119 KPJ

No. Perintah	Nama Orang yang disyaki	Tempoh Tahanan	Tarikh dilepaskan Tanpa Syarat	Tarikh Jaminan Polis diberi	Tarikh dihadapkan di Mahkamah

Pekeliling Pendaftar Mahkamah Tinggi Malaya Bil 1 Tahun 2011

PROSIDING REMAN DI MAHKAMAH MAJISTRET DI SEMENANJUNG MALAYSIA

Dengan hormatnya saya diarahkan untuk merujuk kepada perkara di atas.

2. Seperti mana YBhg Dato/Datin/Tuan/Puan sedia maklum, terdapat dua isu berkaitan dengan prosiding reman yang telah dibngkitkan ketika Persidangan Pegawai Kehakiman 2011 yang lalu itu:

i. Prosiding reman yang dikendalikan di lokap polis.
ii. Minit Reman yang tidak seragam

3. i. **Prosiding reman yang dikendalikan di lokap Balai Polis**

Adalah didapati kebanyakan amalan prosiding reman pada hari Sabtu, Ahad dan cuti umum yang dijalankan oleh Mahkamah pada ketika ini adalah dikendalikan di lokap-lokap balai polis. Setelah mempertimbangkan amalan tersebut dari aspek keselamatan dan integriti Majistret/Pegawai Kehakiman yang menjalankan prosiding reman di dalam waktu tersebut, adalah dengan ini diarahkan **amalan menjalankan prosiding reman dilokap pada hari Sabtu, Ahad dan cuti umum hendaklah dihentikan dengan serta-merta.** Oleh yang demikian , semua prosiding reman pada hari Sabtu, Ahad dan cuti umum hendaklah dijalankan di Mahkamah. Seorang staf Mahkamah hendaklah turut hadir untuk membantu Majistret/Pegawai Kehakiman untuk menjalankanprosiding reman pada hari-hari tersebut.

Arahan ini adalah tidak terpakai kepada pusat tahanan yang mempunyai Mahkamah yang telah digazetkan untuk tujuan reman. (Contohnya Pusat Tahanan Reman, Bukit Jalil)

ii. **Minit Reman yang tidak Seragam**

Bagi tujuan penyeragaman minit reman pula, penggunaan Borang seperti di **Lampiran A** hendaklah digunakan sebagai minit reman untuk menggantikan apa-apa format sedia ada. Namun begitu haruslah diingatkan bahawa borang seragam tersebut hanyalah sebagai satu cara untuk membantu melicinkan proses pengendalian prosiding reman yang dikendalikan. YBhg Dato/Datin/Tuan/Puan hendaklah berpegang kepada prinsip undang-undang dan sentiasa menggunakan budi bicara Kehakiman dalam membuat perintah reman. YBhg Dato/Datin/Tuan/Puan hendaklah berpuas hati, setelah mendengar permohonan dan meneliti diari siasatan polis bahawa terdapat alasan untuk mempercayai tuduhan atau maklumat yang ada terhadap saspek adalah cukup dan saspek perlu ditahan reman untuk penyiasatan.

Sekian. terima kasih.
" BERKHIDMAT UNTUK NEGARA "

Saya yang menurut perintah,

(DATO' CHE MOHD RUZIMA BIN GHAZALI)
Pendaftar
Mahkamah Tinggi Malaya
Mahkamah Persekutuan Malaysia
PUTRAJAYA

A

LAMPIRAN A

Helaian No: .....

No. Kes: .....

B

MINIT PERMOHONAN REMAN

DI BAWAH SEKSYEN 117 KANUN PROSEDUR JENAYAH

Tarikh : ...../...../20.... Saspek:1. .....

Masa : .....am / pm 2. .....

Pemohon : Insp./ Sjn. : ..... 3. .....

C

Peguam : ..... 4. .....

(Jika ada)

D

1. TUJUAN PERMOHONAN DITERANGKAN KEPADA SASPEK DAN MAHKAMAH BERPUASHATI SASPEK FAHAM TUJUAN PERMOHONAN

2. ALASAN PERMOHONAN:

E

i) _____

ii) _____

iii) _____

iv) _____

3. HUJAH PEGUAM / ADUAN SASPEK / RAYUAN:

F

i) _____

ii) _____

iii) _____

iv) _____

G

4. SETELAH MAHKAMAH MENELITI PERMOHONAN DAN HUJAHAN/RAYUAN PEGUAM/SASPEK, MENDAPATI:

i) PERMOHONAN DITOLAK KERANA (NYATAKAN ALASAN): _____

H

ii) SUSPEK DITAHAN _____ HARI DARIPADA _____ SEHINGGA _____ ATAS ALASAN PERMOHONAN DI PARA (2) NOMBOR _____ DI LOKAP _____

_____

MAJISTRET / PENDAFTAR

I

[55] The issuance of the above two documents reemphasize the requirement for strict compliance with the provisions of ss 117 and 119 of the CPC. Magistrates, session court judges and registrars in performing their duties in issuing remand orders and extension remand orders are required to adhere strictly to the requirements and the formats as prescribed.

[56] Coming back to the appeal before us here, the appellants contended that ss 117 and 119 of the CPC had been complied with and therefore the remand orders were lawful. The magistrate issuing the remand orders was performing a judicial act and the appellants were merely following a legal order of the magistrate and s 32 of the Police Act 1967 affords them protection. Besides, the remand orders were never set aside and no appeal or revision pursuant to the provisions of the CPC was made.

[57] The Court of Appeal disagreed with the above contentions and for the reasons following, we agree with the Court of Appeal.

[58] We have set out the law in the preceeding paragraphs of this judgment and we will now embark on the exercise of determining whether the Court of Appeal was justified in allowing the respondent's claim for the declaration sought in respect of his arrest and subsequent detention.

[59] The Court of Appeal we note, had done what the learned JC had failed to do, namely, to consider the evidence as regard to the application for the remand orders. The learned JC had failed to consider the validity or legality of the remand orders issued by the magistrate.

[60] In dismissing the respondent's claim for wrongful detention, at para 11 of his judgment, the learned JC had ruled:

> ... Plaintif ditahan dan dibawa ke Mahkamah untuk direman atas alasan disyaki secara munasabah terlibat dalam pergaduhan di restoran Zubaidah di MITC. Sama ada betul atau tidak, itu bukan persoalan yang harus ditentukan oleh saya dari segi itu. Namun perintah reman di sini telah dikeluarkan dengan teratur dan sahih oleh majistret. Dengan itu saya tidak membenarkan tuntutan untuk tahanan tidak sah sepertimana dipohon.

[61] With due respect, we are unable to fathom as to how the learned JC had come to that conclusion when there is not the slightest indication as to his treatment of the evidence to support that conclusion. We agree with the Court of Appeal that 'the learned trial judge had not given sufficient consideration to all the surrounding facts in evidence before him'. In fact, from our reading of the above mentioned paragraph of the judgment, it is quite apparent that the learned JC considered it as a non issue.

[62] The Court of Appeal had at paras 37 and 38 of its grounds of judgment considered the evidence with respect to the first and second remand orders respectively. We do not propose to set out those two paragraphs, but suffice it to say that the evidence from the testimony of the third and fourth appellants herein in their cross examination as considered by the judges of the Court of Appeal were sufficient enough to support its conclusion as stated in the

following paragraphs of its judgment:

> 39. What was obvious from the above evidence in court was that, firstly, the third respondent was not the arresting officer in the case of the plaintiff. There was no denying the fact that only such an arresting officer could vouch as to the circumstances or suspicion to support the remand of the plaintiff for further investigation. To compound matters, the third respondent did not even know who this officer was. What seemed to have happened here was that a group of nine persons had been herded to the court on the morning of the 22 November 2008 and third respondent sort of mechanically obtained the first remand order against the appellant.
>
> 40. Secondly on 28 November 2008, when the extension of the remand was applied for at the hospital, it had already been determined by the police that the appellant was at the alleged time of the fight not at Restoran Zubaidah (MITC) (where the fight under investigation had taken place) but at another location, namely at Rally Club, as had maintained by the appellant always. Despite the fourth respondent being aware of this fact or development at that stage in the investigation, the magistrate was not informed accordingly. This result of investigation was also admittedly not recorded in the investigation diary in respect of this case produced to the court.
>
> 41. Having considered the law and having examined the record we therefore found that there were merits in the submissions of counsel for the appellant, that the first remand order, as well as the subsequent extension, were obtained by the police from the magistrate(s) without the third and fourth respondents duly complying with the safeguards laid out in law for remand orders to be issued. What was at stake here was the liberty of an individual. The first remand order and the subsequent extension were therefore, in our view, improperly and unlawfully obtained. The police force were charged with the task of protecting the people and they had to act responsibly and within the prescribed limits explicitly provided in law in the exercise of their powers.

[63] The onus is always on the police, the appellants herein, to satisfy the magistrate that an order to remand the respondent is necessary. As required by s 119 of the CPC, the entries in the investigation diary must support the conclusion that there are reasonable grounds for believing the information or accusation that the respondent was involved in the fight at the restaurant at MITC Melaka and also that further investigation is needed to fill in the gaps in the evidence gathered so far and it is necessary for such purpose to order a further remand (see: *Re: Syed Mohammad b Syed Isa; Mohd Rosdi b Jaafar; Thiagarajah a/l Palaniandy; Rajis a/l Seeni Din & Ors* [2001] MLJU 163).

[64] It is incumbent on the part of the magistrate issuing a remand order under s 117 of the CPC to properly apply his or her mind. To enable the magistrate to do so, the appellants are duty bound to comply with the strict requirements of the provisions of ss 117 and 119 of the CPC. Remand orders should not be taken lightly or as a matter of mere formality.

[65] In the course of his submission, learned counsel for the respondent in the person of Mr J Amardas had referred to us the record of proceedings before the learned magistrate for the application of the first remand order. The records as shown at pp 388–391 of *rekod rayuan Jld* 2(2) *Bhg* B and *Bhg* C, from our scrutiny fell far short in meeting the requirements as stipulated in ss 117 and 119 of the CPC. The application was made by Insp Manimannen ('the third appellant') for the remand of five named suspects on the ground that 'siasatan tidak dapat diselesaikan dalam tempoh 24 jam' beside giving a brief facts of the case. The respondent's name was not among the original five named suspects in the application. His name was included in another sheet of paper containing another nine names of other suspects together with the respective police report number. In so far as the notations or the notes by the magistrate (which we found to be hardly legible in most parts) it merely stated:

> G: Perintah direman selama 7 hari hingga 28/11/2008 di bawah sek. 117 KAJ
>
> — Alasan spt (illegible)
>
> ...

Perhaps, the magistrate concerned was unaware or chose not to abide by the Arahan Amalan and Pekeliling Pendaftar which we had referred to earlier.

[66] We pause here to recall the observation made by Vohrah J (as he then was) in *Sivarasa*'s case on the omnibus application for the detention of ten named persons in that case with no condescension to details as to what each of them was arrested for and why it was necessary to extend their remand. Likewise in the instant case such details and/or information were also lacking.

[67] The learned JC had also found that when the third appellant applied for the remand order he was unaware as to the reason why the respondent was detained. Nevertheless the learned magistrate issued a seven day remand on the respondent. Despite this fact, the learned JC held that 'Namun perintah remand di sini telah dikeluarkan dengan teratur dan sahih oleh majistret'.

[68] It is not surprising that the investigations were unable to be completed within 24 hours as stated in the application because as the facts revealed, the respondent was merely being kept in police custody, interrogated and physically tortured from the time of his of arrest at about 3 or 4am until he was produced before the magistrate for the remand order at about 11am. That perhaps too, was the reason for the lack of the entries in the diary as required under ss 117 and 119 of the CPC.

[69] It is also worthy to note that in his evidence under cross examination, the fourth appellant (ACP Jay January Sio Wou) had candidly admitted of not complying with s 119 of the CPC. This is despite the fact that he was the one who applied for the extension of the remand order against the respondent

which was made at the Melaka General Hospital. This is a clear evidence of non compliance with the provisions. We need not comment or say anything further. Despite the fact that seven days had lapsed, there was nothing produced before the magistrate indicating the day by day entries of the proceedings and progress of the police investigation as required under s 119(1) of the CPC. In our view, not only the diary referred to in the section must be in the form as specified therein, but it must also be replete with grounds and information against the respondent as to justify his further remand. The onus is on the appellants to satisfy the magistrate. As for the magistrate issuing the extension remand order, it seemed he was quite happy to issue the same by merely stating:

> Mahkamah: OYDS 3, 4 & 5 ditahan reman lanjut selama 7 hari sehingga 5/12/08 di bawah s 117 KPJ untuk bantu siasatan.
>
> Alasan spt permohonan.

In our view, a bare statement accepting the reasons given in an application such as this is insufficient compliance with s 117 of the CPC.

[70] The reasons for the application (*alasan permohonan*) as stated by the investigating officer state as follows:

3.1	Untuk mencari rakan sepenjenayah suspek yang masih bebas.
3.2	Untuk mendapatkan barang-barang kes yang dipercayai disembunyikan.
3.3	Untuk mendapatkan sampel DNA suspek bgi tujuan perbandingan.
3.4	Untuk membuat kawad cam bagi suspek-suspek yang belum dibuat pengecaman.
3.5	Untuk mendapatkan kordinasi nombor-nombor serta SMS antara telefon suspek-suspek semasa kejadian.
3.6	Untuk menyiapkan kertas siasatan dan pertuduhan.
3.7	Untuk merujuk kertas siasatan kepada KJSJ Melaka.
3.8	Untuk merujuk kes kepada YA TPR.

[71] It must be emphasised that a magistrate exercising his discretion under s 117 of the CPC is performing a judicial function which is subject to scrutiny. It is incumbent upon him to apply his mind before issuing an order under the said provision. The prerequisites of ss 117 and 119 of the CPC must be satisfied. The object, purpose and design of the two provisions of the CPC are meant for the protection of the subject. Both provisions are couched in the mandatory terms and must strictly be complied with. Failure to do so may gravely prejudice the liberty of a subject. It cannot be gainsaid that where the liberty of a citizen is affected, the law must be adhered to strictly.

[72] We endorse the findings of the Court of Appeal that not only the strict requirements of ss 117 and 119 of the CPC had not been satisfied but there was also dereliction of duty and obligation bordering gross irresponsibility on the part of the third and fourth appellants and also suppression of material development in the investigation as to the involvement of the respondent at the stage where the application for the extension of the remand order was made. At para 42 of its judgment, the Court of Appeal said:

> 42. Although we might not go so far as to say that the Police had willfully deceived the Magistrate or obtained those orders on a 'lie' (as argued by counsel), it was nevertheless abundantly clear that there was dereliction of duty and obligations bordering on gross irresponsibility on the part of the third and fourth respondents as police officers when applying for those remand orders from the magistrate. It could not be gainsaid that the first remand order was obtained by the police from the magistrate without having adduced to the court through the arresting officer (or not the least being able to identify the arresting officer) relevant material to ground reasonable suspicion or other sound basis to detain the appellant. In so far as the extension order was concerned, what was beyond any dispute from the record, was that there was here suppression of a material development in the investigations at that stage, namely that the appellant's story that he was not at the scene of the fight had by then been verified and confirmed by the police; there was therefore no basis for any further detention of the appellant.

[73] We are in agreement with the court of appeal that the first remand order as well as the subsequent extension were obtained by the police from the magistrate(s) without the third and fourth appellants duly complying with the safeguards laid out in law for the remand orders to be issued. We are constrained to say that if the requirements of ss 117 and 119 of the CPC had not been complied with how then, can the magistrate make an informed decision as to whether to issue or not the remand order. The magistrate has to satisfy himself as to the necessity of the order and that the period of detention also ought to be restricted to the necessities of the case (*Balkrishnan v Emperor* AIR 1931 Lah 99).

Section 32 of the Police Act 1967

[74] We now move on to deal with the contention of the Appellants on the protection afforded under s 32 of the Police Act 1967 and their reliance on the case of *Chong Fook Kam & Anor v Shaaban & Ors*.

[75] The facts of the case in *Shaaban* may be stated as follows. The defendants, who were police officers, had arrested the plaintiffs who were the driver and an attendant of a lorry without warrant. The arrest was as a result of investigations carried out by the defendants on receiving a complaint of a hit-and-run road accident. The lorry which the first plaintiff was driving answered the description of the lorry involved in the accident. The plaintiffs

were brought before a magistrate the following day and a detention order was obtained. As there was insufficient evidence to connect them with the accident, the plaintiffs were later released. They brought an action for damages for false imprisonment. The action was dismissed. The learned judge held that the arrest was lawful as there was sufficient information available to the defendants at the time of the arrest to give rise to a reasonable suspicion that the plaintiffs had committed a sizeable offence under s 304A of the Penal Code or s 34A of the Road Traffic Ordinance.

[76] The plaintiffs appeal to the Federal Court. Learned counsel for the plaintiffs agreed that the detention may be divided in two parts namely: (a) detention prior to the detention order issued by the magistrate under s 117 of the CPC; and (b) detention after that order. No claim was therefore made in respect of the second part. For the record, the plaintiffs were arrested at about 9am on 11 July 1965, brought before the magistrate for detention under s 117 the next day, and released a day later on 13 July 1965.

[77] The Federal Court allowed the appeal and damages as agreed between the parties in the sum of $2,500 was awarded to the plaintiffs.

[78] On further appeal to the Privy Council by the defendants, it was held that the test of reasonable suspicion could not be equated with that of a prima facie proof and the Federal Court was held to have used the wrong test on the powers of arrest by the police. The police had reason to suspect that the plaintiffs were concerned in the offence of reckless driving and therefore their detention was lawful.

[79] Before us, the learned senior federal counsel relied on a passage in the judgment of the Federal Court touching on the s 117 detention which goes to say:

> An order of a magistrate authorizing the detention of the arrested person beyond the period of 24 hours made under s 117 is a judicial act and cannot found a claim for damages against the magistrate because of s 107(1) of the Courts Ordinance 1948, which reads:
>
> > No ... Magistrate or other person acting judicially shall be liable to be sued in any civil court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, nor shall any order for costs be made against him, provided that he at the time in good faith believed himself to have jurisdiction to do or order the act complained of.
>
> Nor may such an order found a claim for damages against a police officer because s 41(1) of the Police Ordinance No 14 of 1952 (now s 32(1) of the new Police Act No 41 of 1967) provided:
>
> > Where the defence to any suit instituted against a police officer is that the act

complained of was in obedience to a warrant purporting to be issued by any competent authority, the court shall, upon production of the warrant containing the signature of such authority and upon proof that the act complained of was done in obedience to such warrant, enter judgment in favour of such police officer.

In view of these provisions, counsel for the plaintiffs was right in not claiming damages in respect of the detention following the magistrate's detention order.

[80] The provision of s 107 of the Courts Ordinance 1948 is now embodied in s 14 of the Courts of Judicature Act 1964 which provides as follows:

14 Protection of Judges and other judicial officers

(1) No Judge or other person acting judicially shall be liable to be sued in any civil court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, nor shall any order for costs be made against him, provided that he at the time in good faith believed himself to have jurisdiction to do or order the act complained of.

(2) No officer of any court or other person bound to execute the lawful warrants or orders of any Judge or other person acting judicially shall be liable to be sued in any civil court for the execution of any warrant or order which he would be bound to execute if within the jurisdiction of the person issuing the same.

(3) No sheriff, bailiff or other officer of the Court charged with the duty of executing any judgment, order or warrant of distress, or of attaching any property before judgment, shall be liable to be sued in any civil court in respect of any property seized by him, or in respect of damage caused to any property in effecting, or attempting to effect the seizure, unless it shall appear that he knowingly acted in excess of the authority conferred upon him by the writ, warrant or order in question, and he shall not be deemed to have acted knowingly in excess of his authority merely by reason of knowing of the existence of a dispute as to the ownership of the property to seized.

[81] The decision in *Shaaban* in relation to the immunity and protection given under s 32 of the Police Act 1967 and s 14 of the Courts of Judicature Act 1964 has been followed in a number of cases such as *Saul Hamid bin Pakir Mohammad v Inspektor Abdul Fatah b Abdul Rahman & Anor*, *Ketua Polis Daerah Johor Bahru, Johor & Ors v Ngui Teck Choi* and *Baljeet Singh a/l Katar Singh & Ors v Ng Sek Wah* (a decision of the Court of Appeal in Civil Appeal No B-01–124 of 2011 (unreported)). These are all Court of Appeal decisions.

[82] In *Datuk Seri Khalid bin Abu Bakar & Ors v N Indra a/p P Nallathamby (the administrator of the estate and dependent of Kugan a/l Ananthan, deceased) and another appeal* [2015] 1 MLJ 353 (*Kugan*'s case), the provision of s 32 of

the Police Act 1967 was dealt with by the court in deciding that the s 117 detention was unlawful. We will deal with it shortly later.

[83] For ease of reference we will also set out s 32 of the Police Act 1967 which provides as follows:

> 32 Non-liability for act done under authority of warrant
>
> (1) Where the defence to any suit instituted against a police officer, an extra police officer, volunteer reserve police officer or an auxiliary police officer is that the act complained of was done in obedience to a warrant purporting to be issued by any competent authority, the court shall, upon production of the warrant, enter judgment in favour of such police officer, extra police officer, volunteer reserve police officer or auxiliary police officer.
>
> (2) No proof of the signature of such authority shall be required unless the court has reason to doubt the genuineness thereof; and where it is proved that such signature is not genuine, judgment shall nevertheless be given in favour of such police officer or extra police officer if it is proved that, at the time when the act complained of was committed, he believed on reasonable grounds that such signature was genuine.

Kugan's case

[84] In the circumstances of the matter before us, it is pertinent to consider *Kugan*'s case in some detail. The brief facts of the case as summarised in the report goes as follows: The plaintiff who was the mother and the administrarix of the estate of Kugan a/l Ananthan, ('the deceased') claimed damages against the defendants for negligence and/or breach statutory duties for unlawfully having killed the deceased. In was pleaded that the first defendant and/or other police personnel had wrongfully and intentionally assaulted and beat the deceased resulting in the death of the deceased whilst the deceased was detained by the police at the Taipan police station. The plaintiff also claimed for damages against the defendants for misfeasance of public office, assault and battery, false imprisonment, aggravated, exemplary, vindicatory and special damages. According to the plaintiff, the deceased was arrested by the police on 14 January 2009 and the defendants did not inform the plaintiff as to where the deceased was being held. On 20 January 2009 at about 9am, the plaintiff was informed by a police officer that the deceased had died whilst in the police custody. On 21 January 2009 the first defendant, being the chief police officer of Selangor at the material time had issued a false explanation to the media on the deceased's cause of death. He had alleged that 'the deceased had asked for a glass of water and then collapsed and died'. It was contended that the first defendant had made attempts to cover up the real cause of death of the deceased and/or issued statements calculated to exonerate the police from liability with the full knowledge that the death was unlawfully caused by the

members of the police force. The body of the deceased bore extensive marks of beating and other severe physical trauma. The first autopsy showed that there were '22 categories of external wounds' and the cause of death was stated as 'pulmonary edema'. Upon the release of the first autopsy report, the first defendant again issued a public statement that the deceased had died 'due to water in lungs'. The first autopsy report was inconsistent with the external marks of abuse on the body of the deceased. The pathologist, Dr Abdul Karim bin Tajudin was subsequently found guilty of professional misconduct by the Malaysian Medical Council in preparation of the first autopsy report and had been reprimanded. A second autopsy report conducted upon the request of the plaintiff showed that there were '45 categories of external injuries' on the body of the deceased and a wide range of internal injuries. The second autopsy report concluded that the cause of death of the deceased was due to 'acute renal failure due to rhabdomyolysis due to blunt trauma to skeletal muscles'. The second defendant was found guilty under ss 330 and 331 of the Penal Code ('the Code') for causing grievous hurt to the deceased. As such, the plaintiff claimed that the defendants were liable for misfeasance in the public office and claimed for damages under ss 7 and 8 of the Civil Law Act 1956.

[85] The plaintiff launched the suit claiming damages in the form of aggravated, exemplary, vindicatory and special and premised it on the tort of negligence, breach of statutory duties for unlawfully causing the death of the deceased, misfeasance of the public office, assault and battery and false imprisonment.

[86] The High Court allowed the plaintiff's claims and awarded damages as prayed.

[87] For purposes of the present appeal, we will deal with the issue of false imprisonment. Before the High Court, it was submitted by learned senior federal counsel for the defendants therein that:

(a) the deceased had been lawfully remanded by the magistrate under s 117 of the CPC; and

(b) the police are protected under s 32 of the Police Act 1967 for the immunity in carrying out their duty.

[88] For the plaintiff, it was submitted that the detention of the deceased become unlawful on the grounds that:

(a) he was detained in an *ungazetted* lockup and had breached the lockup rules; and

(b) severe assault and battery were inflicted on the deceased in the course of interrogation.

[89] In allowing the plaintiff's claim under the head of false imprisonment, the learned High Court judge (the late VT Singham J) had the following to say on the s 117 detention and s 32 of the Police Act 1967. We deemed it necessary to reproduce what the learned judge held at paras 27 and 28 of his judgment which said:

> [27] The deceased was detained for investigation in respect of theft of a motorcar pursuant to a lawful remand warrant granted by the magistrate of the magistrate's court, Petaling Jaya under s 117 of the Criminal Procedure Code. *However, the remand warrant was abused where the deceased who was taken in police custody pursuant to the lawful remand warrant was beaten and assaulted by police officers or policemen who had access to the deceased during the intensive interrogation and the grievous injuries must have been deliberately inflicted on the deceased as shown by the post mortem report. Consequently, the detention must be unlawful and necessarily result in false imprisonment as the purpose of the remand warrant had been abused to such an extent that grievous injuries were inflicted on the deceased by the policemen while the deceased was in police custody which had resulted in the deceased's death*. It is important to stress that the plaintiff is not questioning the validity of the remand warrant which at the time had been obtained lawfully but the challenge is on the subsequent events when the tortious act were committed and grievous injuries were inflicted on the deceased under the pretex of using the lawful remand warrant and which had resulted in the death of the deceased. If the lawful remand warrant is subjected to abuse and the abuse was to such an extent that there is an element of criminal and tortious acts having been committed during the period of his detention as it happened in the present case, which had resulted in the deceased's death, then the detention, as contended on the plaintiff's behalf would become unlawful. Accordingly the detention would result in false imprisonment and the plaintiff is entitled to damages when death occurs in police custody as it has, as a matter of fact in the present case.
>
> [28] It is important to observe that it is not only to the deceased's family and the public at large that the police officers and the defendants are responsible, but they are also responsible and answerable to the court under whose remand order the deceased was held in police custody to carry out investigation in a lawful manner against the deceased who was suspected of committing theft and surely not to inflict grievous injuries or to cause death to the deceased as it happened in the present case. In this respect, a police officer or for that matter an Investigating Officer who is able to persuade a magistrate to exercise his or her discretion to grant the remand warrant under s 117 of the Criminal Procedure Code is subsequently found to have abused his or her power and use the remand warrant to cause injuries or death to the suspect, in the present case, the deceased, it may tantamount to contempt of court because the remand warrant was issued by the magistrate for a lawful purpose as provided under the law namely, s 117 of the Criminal Procedure Code but however, if it is found the remand warrant which is a judicial order obtained by investigating officer from a magistrate is abused, the investigating officer may be answerable to the magistrate and may tantamount to committing contempt of court. In fact the remand warrant dated 15 January 2009 issued by the magistrate of the Magistrate Court Petaling Jaya had directed the deceased to be detained at the police lockup Petaling Jaya and not at the Taipan Police Station which admittedly did not have a lockup, be it any lockup or *gazetted* lockup. Therefore, and on the factual matrix of

this case, this court finds there is a cause of action for false imprisonment which the defendants are liable to the plaintiff. *Accordingly, s 32(1) of the Police Act 1967 does not assist the defendants as the acts committed was not done in obedience of the remand warrant* issued by the magistrate. (Emphasis added.)

[90] For the record, the plaintiff was awarded among others the following:

(a) RM192,000 damages for loss of support;

(b) damages for pain and suffering RM50,000;

(c) damages for assault and battery RM50,000;

(d) damages for false imprisonment RM100,000;

(e) damages for misfeasance in public office in the sum of RM100,000; and

(f) exemplary damages in the sum of RM300,000.

[91] The defendants appealed to the Court of Appeal.

[92] Disagreeing with the learned High Court judge and allowing the defendants' appeal on the issue of false imprisonment, the Court of Appeal held that the deceased's remand is a consequence of a judicial act, being an order given by a magistrate and the abuses which the deceased endured do not and cannot give rise to a cause of action for false imprisonment.

[93] In so holding, the Court of Appeal relied on the decision of another Court of Appeal in *Ketua Polis Daerah Johor Bharu, Johor & Ors v Ngui Teck Choi* which held that since the remand order under s 117 of the CPC was on exercise of a magistrate's criminal jurisdiction, the said remand order remain a lawful order unless and until it is set aside by a High Court exercising its criminal appellate or revisionary power. As such, the Court of Appeal held that the tort of false imprisonment is not available to the plaintiff as there was in place a valid remand order.

[94] The appeal was allowed in part and the award of RM100,000 for false imprisonment was set aside and the rest of the decision was affirmed.

[95] The defendants in *Kugan*'s case has been given leave to appeal to the Federal Court on the question of law: with regard to the award of exemplary damages in respect of claims brought under s 8 of the Civil Law Act 1956. The two questions of law posed were:

(a) whether s 8(2) of the Civil Law Act 1956 (Act 67) which bars the awarding of exemplary damages in an estate claim is applicable where

A the death of the deceased is as a result of a breach of his constitutional right to life; and

(b) for the purpose of an estate claim under s 8 of the Civil Law Act 1956 (Act 67); whether the acts that make up the tort of misfeasance in public office must be the acts that occurred before the death of the deceased.

B

[96] In our considered view the two questions of law referred to above and which has been decided by the court is of no relevance for purposes of determining the issue of law raised in the instant appeal which is not a claim C under s 8 of the Civil Law Act 1956.

[97] Coming back to the instant appeal, before the Court of Appeal, *Kugan*'s case was heavily relied upon by the respondent as an appellant therein and this may be evinced from the following paragraphs of the Court of Appeal's D judgment:

> 28. Counsel for appellant submitted that the observation of this court in *Kugan*'s case did not restrict or necessarily mean that any magistrate's order of remand could only be challenged or set aside by way of a criminal appeal or revision. It was urged upon us that a collateral attack could still be mounted by way of a civil suit to have E the detention pursuant to any such order to be declared to have been 'unlawful', if the 'unlawfulness' of the remand order was expressly pleaded and constituted a specific issue for determination in that suit. Moreover, the appellant's complaint here, it was contended, was not directed so much against the magistrate's action but against the conduct of the third and fourth respondent in not complying with F requirements of the law and not being forthright with the court when securing the remand orders.
>
> 29 ...
>
> 30 ...
>
> G 31. Counsel for the appellant before us urged us to note the distinction that whilst the cause of action in *Kugan*'s case was for 'false imprisonment', the appellant in the instant case under appeal before us, had specifically pleaded and sought for a declaration that his detention was 'unlawful' for reason that the remand orders were obtained deceptively and/or obtained without sufficient cause being placed before H the magistrate and premised upon such a declaration he was entitled to be compensated for wrongful detention.

[98] The Court of Appeal in the instant appeal had meticulously considered the Court of Appeal's decision in *Kugan*'s case, and after having considered also I the other authorities cited therein, it decided to depart from the said decision and concluded at para 30 of its judgment:

> 30. It would no doubt be appreciated from the highlighted parts of the above excerpt (paras 18–24) that:

(a) while a detention may be legal it may still be improperly obtained if some regulation or rule governing the detention is breached resulting in an abuse of the powers to detain;

(b) any challenge as to the unlawfulness of the remand order is not limited to an appeal or revision under the CPC but could still be pursued if specifically pleaded in a civil;

(c) the judicial act of the Magistrate in issuing the remand orders may be declared unlawful if the detainee can prove that it was made or obtained mala fides in the first place.

[99] The panel also referred to and considered the case of *Public Prosecutor v Audrey Keong Mei Cheng* another decision of the Court of Appeal which we have considered in para 47 of this judgment on the linkage between ss 117 and 119 of the CPC and the requirement of strict adherence to those provisions.

[100] We find the Court of Appeal was justified in departing from the views expressed by the other Court of Appeal in *Kugan*'s case and by the same token, it has also departed from the decision of another Court of Appeal decision in *Ketua Polis Daerah Johor Bahru, Johor & Ors v Ngui Teck Choi*. We also agree with its decision on the legality of the s 117 detention and the protection and immunity sought under s 32 of the Police Act 1967 and s 14 of the Courts of Judicature Act 1964 as stated in para 43 of its judgment:

> 43. Although the remand order and the subsequent extension order issued by the Magistrate under s 117 CPC were seemingly 'legal' on the face of it, it was the direct lapses and the indifference shown to statutory provisions and procedures by the third and fourth respondents that caused those remand orders to be issued by the court. The magisterial orders were therefore no cover nor could they be relied upon to absolve the respondents from liability for their dereliction of duties which, it must be reiterated, went to the very root of the validity of those orders obtained by the police from the magistrate.

[101] Although it was not so clearly stated, it is implicit from the said para 43 of its judgment that the Court of Appeal had also departed from the position of the law pronounced by the Federal Court in *Shaaban*'s case in respect of these two provisions of the law. In our considered view, the appellants' reliance on the provisions of s 32 of the Police Act 1967 and s 14 of the Courts of Judicature Act 1954 is misconceived.

[102] In affirming the decision of the Court of Appeal, we are of the view that the facts as found by the Court of Appeal are peculiar and clearly distinguishable from the other cases which we have discussed, including the *Shaaban*'s case. The Court of Appeal had found that the strict requirements of the provisions of ss 117 and 119 of the CPC had not been complied with and further, there was a failure on the part of the police to be forthright in applying

for the extension of the remand order to enable the magistrate to make an informed decision on the application. Thus, making the detention of the respondent unlawful. In *Shaaban*'s case, the detention following the magistrate's detention order was found to be lawful.

[103] On the same token, we wish to reiterate and express our agreement with the views expressed by the learned High Court judge, the late VT Singham J in *Kugan*'s case as stated in paras 27 and 28 of his judgment which we have quoted in extenso at para 89 of this judgment. Assaults were committed and injuries were inflicted on the respondent in the instant case while he was in the custody of the police under the pretext of using the remand orders. There was therefore misuse and abuse of power and thus making the detention of the respondent to be unlawful. The police can never be allowed to abuse the powers of detention under s 117 of the CPC. It can never be used for a collateral purpose to extort information or for any other purpose under the pretext of investigation and interrogation. The courts have a responsibility to ensure that detained suspects are not to be improperly treated.

[104] The courts are always vigilant and have a duty to ensure the powers given by the said provisions are properly exercised and used. In this respect, as a reminder, it is perhaps opportune to quote what Tun Suffian, Lord President of the Federal Court said in *Lai Kim Hon & Ors v Public Prosecutor* [1981] 1 MLJ 84 at p 92:

> ... Malaysia should not be allowed to develop into a police state ...
>
> Members of the Force who do their duty in accordance with the law will receive our and public support and encouragement; but those who treat suspects in a cruel manner can expect to receive only very severe punishment from the courts.
>
> Parliament and the public will not allow a Savak to be established here, bringing disrepute to those responsible for the government and for the administration of justice.

[105] While we agree that it is not the function of the courts to take upon itself and dictate the manner as to how the police should carry out their investigation works, it does not mean that the courts should abdicate its judicial functions and seem to be wearing blinkers oblivious to the horror stories and allegations of police brutality and custodial assaults. In this day and age of greater public awareness of police functions, should judges simply fold their arms and declare that nothing can be done about the complaint? The courts have been entrusted with the responsibility to ensure that prisoners and detainees are not improperly treated, let alone be assaulted and inflicted with injuries. This court must insist on civilised standards of human decency and be diligent in maintaining that standard. It is our bounden duty to do so.

[106] The Indian Supreme Court in *Shri DK Basu, Ashok K Johri v State of West Bengal* AIR [1997] SC 610 had made observations at pp 620–621:

> Tortures in police custody, which of late are on the increase, receive encouragement by this type of an unrealistic approach of the Courts because it reinforces the belief in the mind of the police that no harm would come to them if an odd prisoner dies in the lockup, because there would hardly be and evidence available to prosecution to directly implicate them with torture. The Courts, must not loose sight of the fact that death in police custody is perhaps one of the worst kind of crime in a civilized society, governed by the rule of law and poses a serious there at to an orderly civilized society.
>
> The courts are also required to have a change in their outlook and attitude, particularly in cases involving custodial crimes and they should exhibit more sensitivity and adopt a realistic rather than a narrow technical approach, while dealing with cases of custodial crime so that as far as possible within their powers, the guilty should not escape so that the victim of crime has the satisfaction that ultimately the Majesty of Law has prevailed.
>
> Police is, no doubt, under a legal duty and has legitimate right to arrest a criminal and to interrogate him during the investigation of a an offence but it must be remembered that the law does not permit use of third degree methods or torture of accused in custody during interrogation and investigation with that view to solve the crime. End cannot justify the means. The interrogation and investigation into a crime should be in true sense purposeful to make the investigation effective. By torturing a person and using third degree methods, the police would be accomplishing behind the closed doors what the demands of our legal order forbid. No society can permit it.
>
> How do we check the abuse of police power? Transparency of action and accountability perhaps are two possible safeguards which this Court must insist upon. Attention is also required to be paid to properly develop work culture, training and orientation of police force consistent with basic human values. Training methodology of the police needs restructuring. The force needs to be infused with basic human values and made sensitive to the Constitutional ethos. Efforts must be made to change the attitude and approach of the police personnel handling investigations so that they do not sacrifice basic human values during interrogation and do not resort to questionable form of interrogation. With a view to bring in transparency, the presence of the counsel of the arrestee at some point of time during the interrogation may deter the police from using third degree methods during interrogation.

[107] We wish to associate ourselves with the observations made by the Indian Supreme Court in the above mentioned case and fully endorse the same.

Whether the s 117 remand order may be challenged by a collateral proceeding?

[108] Moving on, we will now deal with the contention of the appellants that the detention order under s 117 of the CPC had never been set aside or challenged either by way of an appeal or criminal revision pursuant to

Chapter XXXI of the CPC and until that has been done, the remand order remain good and valid in law. The respondent on the other hand contended that he ought to be allowed to bring a collateral proceeding to challenge the same as an alternative to the procedures as provided in Chapter XXXI of the CPC.

[109] Chapter XXXI of the CPC deals with the powers of a judge to call and examine the record of any proceedings before any subordinate criminal court for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and to the regularity of any proceedings of that subordinate court.

[110] The Court of Appeal in *Kugan*'s case in allowing the defendant's appeal on the issue of false imprisonment arising from the s 117 detention held:

> [21] The deceased's remand is a consequence of a judicial act, being an order given by magistrate on 15 January 2009. *Unless and until this remand is set aside by way of a criminal appeal or revision by the High Court, that remand remains lawful*. It is undisputed that no such application to the High Court had been made by the plaintiff to declare that the remand is unlawful. Though it is pleaded by the plaintiff in the pleadings that the detention had become unlawful on grounds stated earlier, it does not help the plaintiff as we are of the view a separate suit by way of criminal revision should have been commenced and not through this civil suit. (Emphasis added.)
>
> [22] It is our respective view the abuses which the deceased endured do not and cannot give rise to a cause of action for false imprisonment. The cause of action for a tort of false imprisonment arises when a person has been imprisoned without lawful justification and that action is against the person who caused the imprisonment. Here the person who caused the detention is a magistrate exercising his judicial power and that judicial act had not been set aside or declared unlawful.

[111] In so holding, that Court of Appeal had followed the decision of another Court of Appeal in the case of *Ketua Polis Daerah Johor Bahru, Johor Ors v Ngui Teck Choi* which held that the remand order made by the magistrate remained a lawful order until it is set aside by a High Court exercising its criminal appellate or revisionary power and it is not the function of the judge in a civil claim to go behind the remand order and to question its legality or the manner in which it was obtained (see also: *Bala Krishnan Appala Naidu v Ketua Inspektor Prabakaran Shanmugam & Ors (No 2)* [2010] MLJU 2223; [2011] 2 CLJ 890, *Madjai bin Sanusi v Pengarah Imigresen, Johor & Ors* [2000] 5 MLJ 116).

[112] We note that although submissions were made by learned counsel for the appellants on this issue and relying on *Kugan*'s case in the court below, the panel in the appeal however did not seem to have dealt with this issue in its

grounds of judgment. Be that as it may, our reading of the Court of Appeal's ground of judgment clearly shows that in granting the declaration sought by the respondent, it had departed from the view taken by the Court of Appeal in the *Kugan*'s case. This is most apparent when the Court of Appeal opined in para 30 of its judgment and stated:

> 30. It would no doubt be appreciated from the highlighted parts of the above excerpt (paras 13–24) that:
>
> (a) ...
>
> (b) any challenge to the unlawfulness of the remand order is not limited to an appeal or revision under the CPC but could still be pursued if specifically pleaded in a civil action; and
>
> (c) ...

[113] We are inclined to agree with the view expressed by the Court of Appeal in the above statement. It was an opinion expressed after a distillation of a number of authorities cited by David Wong Dak Wah JCA in the *Kugan*'s case. To hold otherwise would in our opinion, be too narrow an approach to be taken by this court.

[114] The respondent in the instant appeal had in his amended statement of claim pleaded and prayed for a declaration that his detention was unlawful and a transgression of his fundamental rights under art 5 of the Federal Constitution. In law, he has a choice either to pursue his cause either by way of the procedures provided under Chapter XXXI of the CPC or by the very action he undertook in this case. He must be allowed to have the choice of bringing an action in a civil court as an alternative to the procedures provided under Chapter XXXI of the CPC. In fact, it would be more cumbersome on his part to adopt the procedures under the CPC and to subsequently file a claim in the civil court. A sheer waste of time and resources, we would add. The High Court, being a court of unlimited jurisdiction has an inherent power to correct any wrong that had been done in breach of any written law and to declare the legality or otherwise of any act purportedly done or exercised pursuant to powers conferred under the law.

[115] The power to grant a declaration has been stated by Raja Azlan Shah Ag LP (as His Lordship then was) 'to be exercised with a proper sense of responsibility and after a full realization that judicial pronouncement ought not to be issued unless there are circumstances that properly call for their making' (see: *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29). We hold this is one instance that properly calls for the making of such pronouncement and for a good reason. The law wills that in every case where a man is wronged he must have a remedy. More so when his constitutional rights have been infringed. *Ubi jus ibi*

remedium — there is no wrong without a remedy (see also *Educational Co of Ireland Ltd v Fitzpatrick (No 2)* [1961] IR 345 Budd J at p 368).

[116] Speaking on the same subject matter, Lord Denning in *Pyx Granite Co Ltd v Ministry of Housing and Local Government and Another* [1958] 1 QB 554 observed:

> The wide scope of it can be seen from the speech of Viscount Kilmuir LC in *Vine v National Dock Labour Board* [1957] AC 488, 498 from which it appears that if a substantial question exists which one person has a real interest to raise, and the other to oppose, then the court has a discretion to resolve it by a declaration, which it will exercise if there is good reason for so doing.

[117] In *Karpal Singh v Sultan of Selangor* [1988] 1 MLJ 64 Abdul Hamid CJ (Malaya) referred to *Declaratory Orders* (2nd Ed) by PW Young on the condition to be satisfied for the grant of such orders as:

> (a) there must exist a controversy between the parties; (b) the proceedings must involve a 'right'; (c) the proceedings must be brought by a person who has a proper or tangible interest in obtaining the order; (d) the controversy must be subject to the court's jurisdiction; and (e) it must not be merely of academic interest, hypothetical or one whose resolution would be of no practical utility.

His Lordship also referred to the observation of Lord Dunedin in *Russian Commercial and Industrial Bank v British Bank for Foreign Trade, Limited* [1921] 2 AC 438 at p 448:

> The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought.

[118] We are satisfied that these conditions have been satisfied and that the court is seized with the power to grant the declaration sought by the respondent.

[119] Before we conclude, let it be stressed that as a custodian of justice, the constitutional guarantee accorded to citizens under art 5 of the Federal Constitution must be upheld by the courts. It is every judge's duty as he solemnly swears under the oath of office to uphold and protect the Federal Constitution. Indeed, it is opportune to recall the words of Lee Hun Hoe CJ (Borneo) in *Re Datuk James Wong Kim Min Minister of Home Affairs, Malaysia & Ors v Datuk James Wong Kim Min* [1976] 2 MLJ 245 at p 251 of the report:

> One of the functions of the courts is to interpret the law. An inherent part of their function is to see that the executive acts within the law and does not encroach unnecessarily into the realm of liberty of the subject. In fact, art 5(1) of the Constitution guarantees that no person shall be deprived of his liberty except in

accordance with the law. If this constitutional guarantee is to have any real meaning at all, then it is imperative that the courts should intervene whenever the liberty of the subject is encroached upon not in accordance with the law.

[120] The respondent's liberty in the instant appeal had been encroached and we must intervene and declare that his detention was unlawful. 'The courts are the final arbiter between the individual and the State and between individuals inter se, and in performing their constitutional role they must of necessity and strictly in accordance with the constitution and the law be the ultimate bulwark against unconstitutional legislation or excesses in administrative action' per Salleh Abas LP in *Lim Kit Siang v Dato Seri Dr Mahathir Mohamad* [1987] 1 MLJ 383; [1987] CLJ Rep 168.

[121] Assault in police custody is a clear violation of the most fundamental liberty guaranteed under the Federal Constitution.

Exemplary damages

[122] While the issue of exemplary damages has not been explicitly covered in the question posed to us, nevertheless we are of the view that premised on the finding of liability for false imprisonment and exacerbated by the unlawful assault while in custody, we must therefore address this issue of exemplary damages notwithstanding that it may also be just consequential in this case.

[123] In approving the Court of Appeal's decision to award exemplary damages to the respondent, we cite with approval the sentiments expressed the learned judges therein as stated in the following paragraphs of the court's judgment:

46. We are also of the unanimous view that this was a proper case for exemplary damages to be awarded to register the court's disdain of law enforcement officers want only disregarding the rules and procedures that determine the parameters of their duties and responsibilities. In this case, this had resulted in a serious violation of an individual's dignity and deprivation of his constitutionally guaranteed freedom, what more, by the very same authority who had the duty to protect and safeguard those rights. To overlook and dismiss without adequate remedy this failure on the part of the police force to act within the law, would be to occasion and injustice to the appellant. The public at large, are also all entitled to be given the assurance that the police force has been forewarned to exercise caution and duly comply with all the requirements of the law before any one is denied their liberty, even only if it was for investigation purposes.

47. James Foong J (as he then was) in *Rohairee Abd Wahab v Mejar Mustafa Omar & Ors* [1997] CLJ Supp 39 had set the guidelines for awarding exemplary damages in the following terms:

While considering the request for exemplary damages, this Court must bear in

A mind that the objective for an award under this category is to punish the defendants, and to display the Court's indignant attitude towards the acts committed by the defendants. However, from the enlightening judgment of Lord Devlin in *Rookes v Bernard* [1946] AC 1129, such damages must be restricted to situations where there are:

B

> ... oppressive, arbitrary or unconstitutional action by the servants of the Government' or where 'the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff'.

C Outside these 2 categories, exemplary damages should not be awarded.

It could not be disputed that it was the respondents' actions, as public servants, in obtaining the remand orders without sufficient cause and in violation of applicable procedures, which has resulted in the appellant's basic constitutional rights of liberty and freedom being infringed and negated in this case.

D

[124] We hasten to add that the award of damages must also reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach and deter further breaches (see: *Attorney General of Trinidad and Tobago v Ramanoop* [2006] 1 AC 328). We also note that apart E from the physical injury occasioned by the assaults, there is also the intangible harm such as the distress and injured feelings suffered by the respondent during the period of his detention. We would further add that the actions of the police in this case have indeed shocked this court thereby warranting the award of exemplary damages.

F

[125] This court, in the judgment of Zainun Ali FCJ in *Ketua Polis Negara & Ors v Nurasmira Maulat bt Jaafar & Ors (minors bringing the action through their legal mother and next friend Abra bt Sahul Hamid) and other appeals* [2018] 3 MLJ 184; [2018] 1 CLJ 585 in disagreeing with the views of the majority in G Appeal No 01(i)-52–10 of 2015(w) had expressed the following on the award of exemplary damages to victims of a constitutional violation to which we subscribe:

> 69. What is important in this appeal is that, once it is accepted that by the common law of England a victim of a constitutional violation has the right to be compensated H by an award of punitive, exemplary or aggravated damages, that in itself translates into a right guaranteed under art 5(1) of the Federal Constitution which for ease of reference is once again illustrated below, where it reads:
>
> > No person shall be deprived of his life or personal liberty save in accordance with the law.
>
> I

[126] At para 71 of the judgment, Her Ladyship further opined:

> 71. Accordingly, where a wrong is committed by the state or an instrument of the state which has the effect of depriving the victim of his life (in the widest sense as

held by this court in *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301, in a manner not in accordance with law, the victim is entitled to an award of exemplary or aggravated damages.

[127] For the reasons above stated, by majority, the appeal is hereby dismissed and we affirm the decision of the Court of Appeal and answering the sole question posed before us in the affirmative. In respect of the award of exemplary damages, we are inclined to increase it to RM100,000 as to reflect the court's indignation towards the actions of the police.

Jeffrey Tan FCJ (delivering supporting judgment of the court):

[128] I must thank my learned brother, Balia Yusof FCJ, for the benefit of having had sight of his draft judgment. I accept all facts set out so assiduously by my learned brother, Balia Yusof FCJ. I entirely agree that the instant remand order was obtained without reasonable cause, and without compliance with s 117 of the Criminal Procedure Code. But yet I am not of the view that it was false imprisonment. Rather than false imprisonment, I believe that it was malicious prosecution, for the following reasons.

[129] Malicious prosecution is not false imprisonment 'There is no similitude or analogy between false imprisonment and malicious prosecution. The consequence of the former is illegal detention, the institution of the latter may on the face of it be manifestly legal but is without probable cause and with malicious motive (33 E & E Digest 465)' (*Wong Kok San v WH Salt* [1952] 1 MLJ 204 per Callow J).

[130] 'False imprisonment may be defined as an act of the defendant which directly and intentionally or negligently causes the confinement of the plaintiff within an area delimited by the defendant' (*The Law of Torts* by Harry Street (7th Ed) at p 23; see also *The Law of Torts in Singapore* by Gary Chan Kok Yew and Lee Pey Woan (2nd Ed) at 02.036). '... partial restriction of freedom of movement is not an imprisonment' (*Cheow Siong Chin v Menteri Dalam Negeri, Malaysia & Ors* [1985] 2 MLJ 95 per Abdoolcader SCJ, delivering the judgment of the court). 'False imprisonment is any total restraint of the liberty of the person, for however short a time, by the use or threat of force or by confinement, without lawful cause. As stated in *Halsbury's Laws of England* (3rd Ed, Vol 38) p 765: 'The gist of the action of false imprisonment is the mere imprisonment; the plaintiff need not prove that the imprisonment was unlawful or malicious but establishes a prima facie case if he proves that he was imprisoned by the defendant; the onus then lies on the defendant of proving a justification ... It would seem clear on the authority of *Warner v Riddiford* that the questions which call for consideration in an action for false imprisonment are: (1) whether there was any imprisonment; (2) if so, by whom it was

committed; and (3) whether there was any legal ground for it' (*Mohamed Lajan v Daud* [1963] 1 MLJ 209 per Gill J, as he then was).

[131] 'Malicious prosecution is an abuse of the legal system. An action in tort for malicious prosecution may be brought once criminal proceedings have been instigated: without reasonable or probable cause (*QIW Retailers Ltd v Felview Pty Ltd* [1989] 2 Qd R 245); have failed (*Everett v Ribbands and Another* [1952] 2 QB 198); and have caused damage to the accused: *Berry v British Transport Commission* [1962] 1 QB 306. If no adequate justification for the proceedings is put forward then malicious intent may be implied' (LexisNexis *Dictionaries, Words, Phrases and Maxims* [M0055]). 'An action or proceeding will be an abuse of process if there is no basis or foundation for it or where it used for an extraneous purpose' (the defendant's part, absence of reasonable cause for the prosecution and actual damage are necessary (for a recent decision see *Kable v State of New South Wales* [2012] NSWCA 243). False imprisonment requires none of these' (*Tort Law Principles* by Bernadette Richards, Melissa De Zwart, and Karinne Ludlow at p 70).

[132] 'False imprisonment arising from an improper arrest of a suspected criminal bears a resemblance to the wrong of malicious prosecution which consists in the abuse of the legal process by maliciously and without reasonable and probable cause instituting a groundless criminal prosecution. The distinction between them lies in whether the restraint on the plaintiff's liberty is directly imposed by the defendant himself, acting either personally or by his agent, or whether there is interposed the exercise of an independent discretion' (*The Law of Torts* by Fleming (1957) Publication at p 38).

[133] *Halsbury's Laws of England* (5th Ed, Vol 97) at para 544 thus distinguished false imprisonment from malicious prosecution:

> The imprisonment for which the claim for false imprisonment lies must be the act of the defendant or of some one for whose acts he is liable, or the result of his ordering, procuring, instigating or actively inciting the arrest. Merely providing a police constable with information which would justify an arrest, and leaving him to exercise a discretion whether or not to effect the arrest, is insufficient to found a liability in false imprisonment, but if the information is false or given maliciously the giver may be regarded as the initiator of proceedings for the tort of malicious prosecution. No claim for false imprisonment otherwise lies against a person who takes proceedings before a magistrate or judge in respect of imprisonment which is caused by the order of the magistrate or judge; the remedy, if any, of the person imprisoned in such a case, is a claim for malicious prosecution against the person who instituted the proceedings.

[134] 'The basic difference between the two has been expressed to be one of presumption. While imprisoning a man is prima facie wrongful, setting the law

in motion is prima facie right and proper. Thus, in a malicious prosecution case, the plaintiff must prove that the defendant lacked reasonable cause for the prosecution whilst in false imprisonment it is the defendant who must prove reasonable cause' (*Civil Actions Against the Police* by Richard Clayton and Hugh Tomlinson (1987, Sweet & Maxwell) at p 246).

[135] 'If the defendant wrongly gives the plaintiff into custody and then the magistrate remands the plaintiff the defendant is answerable in false imprisonment for damages up to the point of the judicial remand. Once a judicial act interposes, liability for false imprisonment ceases. It becomes important at this stage to distinguish false imprisonment from malicious prosecution, a tort concerned with the abuse of the judicial process, and which, unlike false imprisonment, calls for proof of malice and of abuse of reasonable cause. Therefore, if A wrongfully prefers a complaint against B before a magistrate who then issues a warrant or tries him forthwith or remands him, A has not committed the tort of false imprisonment, even if the magistrate has no jurisdiction' (*The Law of Torts* by Harry Street (7th Ed) at p 27; see also *Torts: Commentary and Materials* (11th Ed) by Carolyn Sappideen, Prue Vines and Penelope Watson at p 60). 'A person who brings about an arrest by merely setting in motion the formal process of law, as by making a complaint before a justice of the peace or applying a warrant is not liable for false imprisonment because courts of justice are not agents of the prosecutor and their acts are not imputable to him. He is liable, if at all, only for the misuse of legal process by procuring an arrest for an improper purpose for which the appropriate remedy is an action for malicious prosecution. This rule provides a valuable protection against liability for error in the course of legal proceedings' (*The Law of Torts* by Fleming at p 38).

[136] *Civil Actions Against the Police* at p 116 observed that 'where an imprisonment is effected through judicial proceedings, liability for false imprisonment virtually disappears', on account of the following dicta of Willes J in *Austin v Dowling* (1870) LR 5 CP 534 at p 540:

> The distinction between false imprisonment and malicious prosecution is well illustrated by the case where the parties being before a magistrate, one makes a false charge against another, whereupon the magistrate orders the person to be charged and taken into custody until the matter is investigated. The person making the charge is not liable for the action because he does not set a ministerial officer in motion but a judicial officer is interposed between the charge and the imprisonment.

[137] 'Consequently, where the plaintiff is wrongfully arrested without a warrant and remanded into custody by the magistrates he can only maintain an action for false imprisonment up to the time of the remand. Thereafter, he must sue for malicious prosecution. Even if the court acts without jurisdiction

A the instigator of the complaint cannot be liable for false imprisonment ...' (*Civil Actions against the Police* by Richard Clayton and Hugh Tomlinson at p 116; see also *The Law of Torts* by Fleming at p 39).

B **[138]** It should be highlighted that the common law rule stated in *Austin v Dowling* is still good law (see *Zenati v Commissioner of Police of the Metropolis and another* [2015] 2 WLR 1563 at 1580 (CA); *Austin v Dowling* was last applied in *Coghlan v Chief Constable of Cheshire Police and others* [2018] EWHC 34 (QB)).

C

[139] In *Zenati*, the claimant was remanded in custody on 10 December 2010 by magistrates on suspicion of that his British passport was forged. That passport was genuine. The claimant was released on bail on 9 February 2011. The claimant brought claims for damages against the Commissioner of Police
D for the Metropolis and the Crown Prosecution Service for: (i) breach of his rights guaranteed by art 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms on the basis: (a) from 19 January–9 February 2011 his detention had been contrary to art 5.1(c) since there during that period there had been no reasonable suspicion that he had
E committed an offence; and (b) from 10 December 2010–9 February 2011 his detention had been unreasonably long, contrary to art 5.3, since the defendants had failed to act with special diligence in investigating the offence; and (ii) the tort of false imprisonment from 19 January–9 February 2011. The judge granted the defendants' application to strike out the claims against both
F defendants. On appeal, the English Court of Appeal allowed the appeal in relation to the art 5 claim but dismissed the appeal in relation to the false imprisonment claim.

[140] Lord Dyson MR (Lewison and McCombe LJJ in agreement) held that
G there is no support in any jurisdiction for the submission that a breach of art 5 results in liability for the tort of false imprisonment:

> 53. But there is no support in any jurisprudence for the submission that a breach of article 5 results in liability for the tort of false imprisonment. There is support for
H the contrary proposition. Thus in *R (Faulkner) v Secretary of State for Justice and another* [2013] 2 AC 254 Lord Reed (with whom Lord Neuberger PSC, Lords Mance and Kerr agreed) said at para 13.1: 'A prisoner whose detention is prolonged as the result of a delay ... in violation of article 5(4) of the Convention, is not a victim of false imprisonment.'
>
> I 54. In any event, I do not accept that article 5 requires the law of false imprisonment to be adapted in the way suggested by Mr Southey. Article 5(5) provides a right to compensation in the event of a breach of article 5. There is no compelling need to change our long established law of false imprisonment to reflect article 5. The analogy with Campbell is unconvincing. The lack of a right of privacy was a real gap in our domestic law.

> 55. Nor is it relevant to the common law rule whether the court decides to remand a person in custody without a full appreciation of all the relevant facts. As Mr Johnson points out, the relevant passage in Austin explicitly contemplates that there has been malice on the part of the person making the false charge. Even where the court is misled as to the true facts, that does not mean that it does not exercise its indepedent judgment in deciding whether or not to order an individual to be detained.
>
> 56. In my judgment, therefore, the claim in false imprisonment is bound to fail.

[141] In short, a judicial order provides the defence of lawful authority for the detention or imprisonment (see *Hepple and Matthews' Tort Law: Cases and Materials* by David Howarth, Martin Matthews, Jonathan Morgan, Janet O'Sullivan, Stelios Tofaris (2016 Publication) at p 750).

[142] In the instant case, the respondent was remanded under the judicial order of a magistrate. The remand order might have been wrongly applied. It might even have been that there was no reasonable cause or basis for a remand order. The remand order might have been applied and or issued without compliance with s 117 of the Criminal Procedure Code. The remand order might even have been set aside. But that, with respect, was all inconsequential in a claim for false imprisonment, as the following authorities amply demonstrate.

[143] In *West v Smallwood* (1838) 3 M & W 418; (1838) 150 ER 1208, the defendant went before a magistrate and laid information against the plaintiff. The magistrate issued a warrant. The plaintiff was arrested. The complaint was heard and dismissed. At the trial of the action for trespass and false imprisonment, Lord Abinger CB was of the opinion that the action was misconceived. In the application for a retrial, Lord Abinger CB said:

> I retain the opinion which I expressed at the trial. Where a magistrate has a general jurisdiction over the subject matter, and a party comes before him and prefers a complaint, upon which the magistrate makes a mistake in thinking it a case within his authority and grants a warrant which is not justiciable in point of law, the party complaining is not liable as a trespasser, but the only remedy against him is by an action upon the case, if he has acted maliciously.

[144] Bolland B, who agreed with Lord Abinger CB, said 'In the case of an act done by a magistrate, the complainant does no more than lay before a Court of competent jurisdiction the grounds on which he seeks redress, and the magistrate, erroneously thinking that he has authority, grants the warrant'.

[145] In *Brown v Chapman* (1848) 136 ER 1292; (1848) 6 CB 365, the plaintiff voluntarily went before a magistrate to meet a charge of embezzlement which was there about to be made against him by the defendant. The

magistrate declined to entertain the matter, unless a charge was formally made. The defendant said 'Well, then, I charge him with embezzling 30s'. The plaintiff was then ordered by one of the constables in attendance to go into the dock. The charge was gone into and the plaintiff held to bail. Coltman J held that the act of the defendant amounted to no more than calling upon the magistrate to exercise his jurisdiction, and consequently, that he was not liable to an action of trespass, for the imprisonment of the plaintiff:

> If an individual prefers a complaint to a magistrate, and procures a warrant to be granted, upon which the accused is taken into custody, the complainant, in such case, is not liable in trespass for the imprisonment; and that, even although the magistrate had no jurisdiction. According to the case of *West v Smallwood* (1838) 3 M & W 418, a party who shall make a direct application to a magistrate for a warrant, that another may be taken into custody, is deemed thereby only to make an appeal to the magistrate to exercise his jurisdiction: and the imprisonment is referred to the magistrate's authority, so as to exempt the complainant from all liability in trespass: and what takes place in the presence of the magistrate, ought to be referred to the exercise of his authority, as in *Barber v Rollinson* 1 C & M 330). In that case, the plaintiff having been discharged from criminal custody by a magistrate, was leaving the police- office, when the defendant said — 'I have another charge against him, for forgery'; upon which the plaintiff was again taken, and placed at the bar: and, upon the trial before Lord Lyndhurst, in an action of trespass in respect of this second imprisonment, the plaintiff was nonsuited; and, upon motion to set aside the nonsuit, it was held that the acts of the defendant were part of the proceedings before the magistrate, for which the defendant could not be held liable in trespass; that the taking could not be considered as the act of the defendant, who had only put the law in motion, for which he might be liable in case.

[146] In *Lock v Ashton* (1848) 116 ER 1097; (1848) 12 QB 871, the defendant had given the plaintiff into custody and had him taken to a police officer on a charge of felony. The magistrate heard the charge and remanded the prisoner. On a subsequent examination he was discharged, it being discovered that the charge had been made under a mistake. In the action for trespass and false imprisonment, Lord Denman CJ held that 'The verdict in this case cannot be sustained, the action being trespass and the jury having given damages, not only for the trespass in arresting, but for the remand, which was the act of the magistrate'.

[147] *Lock v Ashton* was applied in *Harnett v Bond And Another* [1924] 2 KB 517 (CA) and [1925] AC 669 (HL), where a sane man was detained in various asylums for nine years. The question was whether the doctor who first caused him to be unlawfully detained could be held liable for the entire period of detention, even though the man was subjected to various subsequent assessments by other doctors. The trial judge directed the jury in accordance with the direct consequences test, advising them that it was open to them to hold that the failure by intervening doctors to appreciate that the claimant

should not be further detained did not break the causal link between the first doctor's unlawful act and the nine-year detention. This is what the jury held but the Court of Appeal reversed the decision and the House of Lords confirmed the Court of Appeal's judgment. In the Court of Appeal, Scrutton LJ expressed himself as follows:

> But it appears to me that when there comes in the chain the act of a person who is bound by law to decide a matter judicially and independently, the consequences of his decision are too remote from the original wrong which gave him a chance of deciding. It was on this principle that in *Lock v Ashton* it was decided that a defendant who had wrongfully taken a person into custody and brought him before a magistrate was not liable for the subsequent remand by the magistrate, which was a judicial act.

[148] *Lock v Ashton* was also applied in *Calix v Attorney General of Trinidad and Tobago* [2013] 4 All ER 401; [2013] UKPC 15, where the appellant was arrested on suspicion of being the person who robbed GN and raped JF. At an identification parade, the appellant was picked out by both GN and JF as the man who had committed the crimes. The appellant was acquitted of both charges. The appellant instituted proceedings for malicious prosecution. Acting judge Aboud J awarded compensation of $38,000 to the appellant. In an *ex tempore* judgment, the Court of Appeal dismissed the appellant's appeal. The Court of Appeal held that the trial judge had correctly assessed compensation for the damage to the appellant's reputation. The Court of Appeal refused to award any compensation for the period of incarceration of 115 days; bail, which had granted, was not assessed by the appellant. On further appeal to the Privy Council, and in relation to the claim for compensation for loss of liberty, Lord Kerr, who delivered the judgment of the Board, said that a judicial act precludes liability in false imprisonment:

> The respondent did not seek to uphold the Court of Appeal's conclusion that the grant of bail was a judicial act which became the cause of the appellant's detention. A claimant's failure to take a grant of bail (which is the avowed basis on which the appellant should not recover compensation for loss of liberty) is not a 'judicial act'. In any event, although a judicial act precludes liability in false imprisonment, it does not relieve the prosecutor of liability in malicious prosecution: the prosecutor remains liable for the damage caused by his setting the prosecution in motion — see *Lock v Ashton* (1848) 12 QB 871; (116 ER 1097).

[149] *Clerk & Lindsell on Torts* (21st Ed) at pp 15–46 concluded that 'An order of a court may be set aside on the ground of error, as a matter of favour or because it was irregularly obtained. There can only be error where there had been a judicial decision and anything done under a judicial decision cannot be a ground of trespass against a party, because it is not his act but the act of the court. It is obvious that, where an order is set aside as a matter of favour, the order is admitted to have been in itself a proper one, and it therefore gives

validity to all proceedings taken while it was still in force'.

[150] *Salmond & Heuston on the Law of Torts* (21st Ed) at pp 126–127 was more direct:

> No action for false imprisonment will lie against a person who has procured the imprisonment of another by obtaining against him a judgment or other judicial order of a court of justice even though that judgment or order is erroneous, irregular, or without jurisdiction. The proper remedy in such a case is an action for malicious prosecution or other malicious abuse of legal process. In an action of that description that plaintiff can succeed only if he proves both malice and the absence of any reasonable and probable cause for the proceedings complained of; whereas in an action for false imprisonment, just as in all other cases of trespass to person or property, liability is created, in general, even by honest and inevitable mistake. The rule, therefore, that no action for false imprisonment will lie against a litigant in respect of judicial imprisonment procured by him is a valuable protection against liability for error in the course of legal proceedings. Accordingly, if the plaintiff has been wrongly arrested without warrant and taken before a magistrate, who remands him in custody, he must sue in respect of his imprisonment before the remand in an action for false imprisonment, but in respect of that which is subsequent to the remand in an action for malicious prosecution. The reason for this distinction is that a man cannot be sued in trespass (and so not for false imprisonment) unless he himself, whether personally or by his agent, has done the act complained of. A court of justice, however, is not the agent of the litigant but acts in the exercise of its own independent judicial discretion. The litigant can be charged only with having maliciously and without reasonable cause exercised his rights of setting a court of justice in motion. This exemption of the litigant from any liability for false imprisonment extends even to cases in which the court ordering the imprisonment has acted without jurisdiction. It is the right of every litigant to bring his case before the court, and it is for the court to know the limits of its own jurisdiction and to keep within them.

[151] What was only pertinent was whether the respondent was remanded under lawful authority at the material time of the remand. Since the respondent was remanded under a judicial order, it could not be false imprisonment.

[152] False imprisonment is a common law tort. Maybe, violation of art 5 of the Federal Constitution could justify an award of exemplary damages (see the views expressed by Lord Dyson and Lord Collins on awards of vindicatory damages in *R (on the application of Lumba) v Secretary of State for the Home Department; R (on the application of Mighty) v Secretary of State for the Home Department* [2011] 4 All ER 1; [2011] 2 WLR 671 at paras 97–101, and 222–237). But no violation of art 5 would turn malicious prosecution into false imprisonment. They are conceptually distinct. One is malice based, while the other is not. Given the interposition of a judicial order for the remand of the respondent, the tort of false imprisonment was not available. But since the

respondent was remanded without reasonable cause, it was malicious prosecution. But alas, there was no claim for malicious prosecution. I would therefore apply *Austin v Dowling* and *Zenati* and dismiss the claim for false imprisonment. Save for that, I would allow the other claims and dismiss the appeal with respect to them.

Appeal dismissed.

Reported by Afiq Mohamad Noor